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Supreme Court of the United States,

October Term, 1897.

JOSEPHINE W. WUPPERMAN,
Libelant and Appellant,

AGAINST

The Steamship CARIB PRINCE,
JAMES KNOTT,
Claimant and Appellee.

No. 45.

BRIEF FOR THE CARIB PRINCE ON REARGUMENT.

STATEMENT.

The cause was brought into this Court by a writ of *certiorari*, issued October 23, 1895 (p. 215), to review a decree of the Circuit Court of Appeals for the Second Circuit, rendered June 5, 1895 (p. 216), which affirmed a final decree of the District Court for the Eastern District of New York, entered October 11, 1894, dismissing the libel herein with costs (p. 169). The appeal was argued in this Court in April, 1897 (No. 286 of October Term, 1896), and in May, 1897, the Court ordered a reargument before the full bench.

(1) Inasmuch as the grounds of claim against the vessel have been shifted somewhat in the different courts, and as the final arguments here by other counsel are branching out beyond the issues litigated in the Courts

below, it is important to recur to the issues raised by the pleadings to the course of the trial in the District Court, and to the assignments of error from that Court to the Court of Appeals.

The libel herein, filed September 19, 1893, stated the cause of action against the steamer as follows:

"SECOND.—That on or about the 31st of August, 1893, there was shipped upon the steamship Carib Prince, then lying in the Gulf of Paria, and bound for the port of New York, and engaged in business as a common carrier, by Dr. T. G. B. Siegert & Sons, five hundred cases of Angostura Bitters, the property of your libelant, to be carried to the port of New York and there delivered unto your libelant in the like good order as received, for a freight agreed to be paid therefor; and the agents of said steamship signed bills of lading therefor, dated the 31st of August, 1893, whereby they acknowledged the receipt of said five hundred cases in good order and well conditioned, and undertook to deliver the same at the port of New York in like good order.

"THIRD.—That thereafter and on or about the day of September, 1893, the Carib Prince arrived at the port of New York and there delivered to libelant the said five hundred cases, but not in like good order as received, and that your libelant has suffered damages thereby in the estimated amount of fifteen hundred dollars, payment of which has been demanded of said agents of said steamship and refused."

The bill of lading referred to was not annexed to the libel, as it should have been (2 *Conkling's Adm.*, 485; *Card* v. *Hines*, 33 Fed., 189; The *Torgorm*, 46 Fed., at p. 203), nor did the libel charge any unseaworthiness of the vessel, or particular acts of negligence by her officers or crew, nor give any information of the grounds on which the liability of the vessel was claimed to rest.

In this respect it did not comply with Admiralty Rule 23 of this Court, which states:

"All libels in instance causes, civil or maritime, shall state the nature of the cause, &c. * * * The libel shall also propound and articulate in distinct articles *the various allegations of fact upon which the libelant relies in support of his suit*, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article."

On March 13, 1894, James Knott, claimant and owner of the vessel, filed his answer, denying any knowledge as to the matters alleged in the paragraphs of the libel above quoted (p. 4).

The reason for this want of knowledge was that at the time of the occurrence the ship was hired out under a charter of demise to the Trinidad Steamship Line, which placed its own officers in exclusive charge of the vessel and her navigation (pp. 86, 148).

Besides joining issue on the affirmative allegations of the libel, the answer pleaded the following separate defenses:

"SIXTH. - For a further defense, the claimant avers that the bills of lading under which the merchandise in question is alleged to have been carried, provided that the merchandise in question was 'to be delivered from the ship's deck,' 'where the ship's responsibility shall cease, in the like good manner and well conditioned, at the aforesaid port of New York; the act of God * * * loss or damage from heat or fire on board, in hulk or craft, or on shore, explosion, steam, *accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances*, jettison, barratry, *any act, neglect or default whatsoever, of pilots, masters or crew, in the management or navigation of the ship* * * * and all and every other dangers and accidents of the seas, rivers or steam navigation, of whatever nature or kind, always excepted * * * weight, measure, quality, contents and value unknown, and not accountable for inaccurate description of goods shipped, for leakage, breakage or insufficiency in packing, or in strength of package, obliteration of or inaccuracies of marks, numbers, designation or address on the packages, nor for damages or loss from vermin, sweating, decay, heat of holds, contact with or smell or evaporation from other goods; *nor for any consequences arising from any of the foregoing exceptions.*' That the owner and charterer of said vessel used all due diligence to have her properly equipped, manned, provisioned and outfitted, and in every way seaworthy and capable of performing her intended voyage, and used all due diligence in and about the transportation of the merchandise in question, and allege that if the cargo mentioned in the libel was damaged as alleged, the damage was due to latent defects in certain rivets, angle irons, braces and straps in the bulkhead between the No. 1 hold and the peak tank just forward of it, or to some error or

fault in the management or navigation of the vessel in filing the said peak tank on the voyage, as will more fully appear on the trial of this cause. The claimant further alleges that each and all of the above mentioned exemptions in the bill of lading are valid by the law of England which prevails at the port where said merchandise is claimed to have been shipped, and where the said bills of lading are alleged to have been issued."

(**2**.) The bill of lading under which the goods were carried was subsequently put in evidence by the claimant (pp. 145-7). It made the goods deliverable "unto J. W. Wuppermann, Esq.," and contained the following list of exceptions (p. 146):

"The Act of God, the Queen's enemies, Pirates, Robbers, Restraints of Princes, Rulers and People, Loss or Damage from Heat or Fire on board, in hulk or craft or on shore, Explosion, Steam, *Accidents to or latent defects in Hull*, Tackle, Boilers and Machinery, *or their appurtenances*, Jettison, Barratry, *any act, neglect or default whatsoever, of Pilots, Master or crew in the management or navigation of the Ship*, Quarantine, Collision, Stranding, and all and every other *Dangers and Accidents of the Seas, Rivers or Steam Navigation, of whatever nature or kind always excepted.* In the event of the Steamer putting back, or into Port, or otherwise being prevented, from any cause, from proceeding in the ordinary course of her voyage, the Master or Agent to have liberty to tranship the Goods by any other Steamer or Steamers. Average (if any) according to York Antwerp rules.

"Weight, Measure, Quality, Contents and Value unknown, and not accountable for inaccurate description of Goods shipped, for Leakage, Breakage, or insufficiency in packing, or in strength of package, obliterations, or inaccuracies of Marks, Numbers, designation, or Address on the packages, nor for damage or loss from vermin, sweating, decay, heat of holds, contact with, or smell or evaporation from other goods; *nor for any consequences arising from any of the foregoing exceptions.*"

The bill of lading was signed by the charterer (p. 147), but it made no reference to any charter-party.

Three other libels were filed at about the same time for similar damage (pp. 174, 190, 200). All four were heard together in the District Court and in the Court of Appeals (pp. 6, 211), where the other three are still pending. The

aggregate damages claimed in all the libels amount to $5,179.79.

(3.) Owing to the fact that, under the charter-party which the vessel was performing at the time of these occurrences, the officers and crew of the vessel were the servants of the charterer, and not of the shipowner (p. 86), neither party to this litigation had any better opportunities than the other for knowing or investigating the facts in connection with the damage or its cause. The declarations of the master are not under the circumstances admissions binding upon the owner; as admissions, they would be binding only upon the Trinidad Line, which is not a party to the cause. The records contained in the ship's and engineer's logbooks are not binding upon either party as declarations by servants, nor is it to be assumed that the witnesses were biased in favor of either party.

(4.) The libelant took the first proofs in the cause by calling Captain Legge (p. 7) and Chief Engineer Keeys (p. 35) as her own witnesses. The claimant afterwards examined the chief officer, Mr. Scott (p. 94), and the carpenter, Hopkins (p. 107), as his witnesses.

(5.) The following facts appeared:

The Carib Prince was a steel steamer of 1,304 tons net register, 300 feet long, fitted for the carriage of passengers and freight (pp. 7, 8, 9, 14). She was a new vessel, having been in commission only about three months before the accident (p. 7). She had four cargo compartments, numbered from forward aft, and carried her engines between the No. 2 and No. 3 compartments. The holds were separated from each other and from the engine-room by water tight iron bulkheads (pp. 7, 8).

The libelant's cargo was stowed in the No. 1 hold properly dunnaged (pp. 107, 110), and was injured by sea water, that escaped from the forepeak tank by the giving way of a three-quarter-inch rivet in the collision bulkhead which separated the peak from the No. 1 hold (pp. 10, 11, 13, 38, 39). The damage occurred a few days after sailing on the voyage (pp. 11, 147).

The forepeak was a triangular space, about thirty-eight feet wide in its upper part along the collision bulkhead, narrowing down to the keel, and also narrowing forward to the stem head (pp. 40, 35, 7, 9). It was about twelve or fifteen feet in length from the stem to the collision bulkhead (pp. 17, 36). Its depth from the between-deck to the bottom was about twenty-one feet (pp. 16, 35).

It was designed for use as a spare ballast tank, and had capacity for about 83 tons of water (pp. 8, 36). It was securely braced by 'thwartship and fore and aft beams, by stiffening bars, and by knee ties at the sides, all of which were inside the tank and by the square chain locker in the centre on the hold side (pp. 141, 41, 25). The face of the bulkhead in the No. 1 hold was smooth, except that it was lap-jointed (p. 9).

The ordinary ballast tanks were in the bottom of the ship, extending from the collision bulkhead to the stern but divided by partitions at the different bulkheads (p. 8). These tanks were about four feet deep, and extended the width of the ship to the bilges on each side, which were from 18 inches to 2 feet across the top, about 18 inches deep and were V-shaped, being formed by the perpendicular sides of the tank and the curved side of the ship (p. 8). The bilges formed a continuous canal from the bow and from the stern of the ship to the engine-room, being connected at the bulkheads by sluice-cocks or valves (pp. 14, 136, 108, 96). The bilges in each hold also had separate pipe connections leading to the engine-room, thus affording two ways of freeing the different compartments of water (pp. 110, 96). For the purposes of safety, the valves of the pipe-line and the sluice-doors in the bulkheads were usually kept shut at sea (*Scott*, p. 96; *Hopkins*, p. 108, 110). They were opened only to relieve the bilges of water, when found there, by means of the sounding pipes, which lead from the deck to the bilges, and were sounded night and morning (pp. 97, 107).

A wooden floor was laid on top of the ballast tank in No. 1 hold, extending over the bilges to the ship's sides. The floor was caulked up to the edge of the bilges; but that part which extended over them was portable,

was not caulked nor made water-tight, and was designed to be lifted in order to clean the bilges (pp. 15, 100). The portable parts of the floor are referred to in the testimony as "limber boards."

On leaving Grenada, the last port of call, the steamer was trimmed two feet by the stern, her draft being 14 feet 10 inches forward and 16 feet 10 inches aft (*Scott*, p. 95). On September 3rd, a day or two later, the peak tank was filled with water, in the expectation that it would enable her to make better speed (pp. 14, 27, 102). The filling of the tank was begun in the watch from four to eight P. M., and occupied about six hours (pp. 102, 27). During this time the ship was "rolling" (p. 162). On the *next morning* (pp. 11, 16, 108, 109) the sounding of the tank disclosed that the water in it had fallen about four feet (pp. 11, 94, 109); and on sounding the No. 1 hold, an accumulation of water was found there (p. 95). The hatches of the No. 1 hold were immediately removed, and the chief officer and carpenter went below, where they were soon joined by the captain and chief engineer (pp. 11, 16). The lower hold was only partly filled with cargo—to the depth of about five feet (pp. 17, 37, 95).

The chief officer at once found water coming through a rivet hole on the port side of the bulkhead, about two feet from the ship's side, and about six or seven feet above the floor, nearly on a level with the top of the cargo (pp. 95, 88, 40, 41). The rivet was one of a row of six that held a knee tie or stiffening bar (pp. 39, 40). The engineer drove the rivet back, and the hole was stopped with a wooden plug (pp. 39, 95.) The chief officer then picked up from a bag lying immediately beneath the hole, the head, or outer end, of a broken rivet, which had broken off behind the head in the countersunken hole in the plate into which the rivet had originally been headed up when hot (pp. 16, 17, 42).

The water which entered the No. 1 hold through this leak accumulated so that it was up to the carpenter's knees in the after part of the hold; but there was no water in the fore part, except the swash due to the movement of the vessel (pp. *Legge* 17, *Hopkins* 110). It is obvious that the

amount of water that escaped from the small space of the forepeak could not have made much of an accumulation in the large No. 1 hold. Five holes were bored in the limber boards on each side, to permit a freer flow of water to the bilges (pp. 109, 111). The pumps were at once started, and the sluice valves opened, and the hold was promptly cleared of water (p. 110). The remainder of the voyage was made without the use of any water ballast forward, and at about the same speed (p. 27).

(**6.**) The rivet head showed a fair, clear break of the iron, but appeared to be defective and brittle from too much hammering when the rivet was driven in the construction of the bulkhead. The defect was latent and undiscoverable by inspection. The evidence of Mr. Scott, chief officer, with respect to this rivet is as follows (p. 103):

"Q. What was the appearance of the iron on that part of the rivet head which you picked up? A. Clear break, as far as I could see.

"Q. What was the appearance of the iron at the place of fracture? A. I took no particular notice of it. It looked fair."

At page 99:

"Will you be able to state, from such examination as you did make, whether the rivet head was on or off at the time you left Grenada? A. I should say the rivet head was on when we left. It must have been on when we left, because we found it on top of the cargo.

"Q. When did you find it on top of the cargo? A. When we found the tank was leaking, on whatever day it was."

(At p. 105): "Q. Was the rivet head that you picked up lying directly in line below the place where the water was spurting on top of the cargo? A. As far as I remember. I didn't take particular notice to an inch or two.

"Q. Was it fixed in your mind that your rivet head came from that hole? A. Came from that hole, yes.

"Q. You associated them together? A. Yes."

Chief Engineer Keeys testified in regard to the broken rivet (p. 48):

By Mr. Black:

"Q. Are you familiar with qualities of iron, to say *whether this rivet is of good quality or not* (Claimant's Exhibit 6)? A. I am, sir.

Q. *Is it good or not?* A. *No, sir.*
Q. *What is its defect, in your judgment?* A. *Inferior iron, short and brittle, without a fibre.*
Q. Has that been annealed? A. Yes, sir.

By Mr. Kirlin:

Q. Might not this condition of fibre have been produced by too much hammering when it was annealing? A. Yes, sir.

Q. When a line of rivets are put in in construction they usually work on three at a time, do they not? A. Yes, sir.

Q. And every time they put in a new one they tighten the one behind it, do they not? A. They tighten the second one behind it; yes, sir.

Q. As the iron is cooling, if the second one behind is hammered too much that will produce a crystalline character in the iron, will it not, and will give it the appearance of being short and brittle? A. Yes, sir.

Q. That is the appearance that this had? A. Yes, sir."

(At p. 45): "Q. *If there was any defect in that rivet,* which has been marked Claimant's Exhibit 6, before it fell off on to the bag of cocoa, *would it have been discoverable by inspection* from the No. 1 hold, looking at it as it was counter sunk in place? A. *No, sir.*

"Q. Why not? A. Because the head of the rivet is hammered close to the face of the plate."

(**7.**) It was contended in the District Court that the damage happened (*a*) from a latent defect in the rivet, and (*b*), because the limber boards were improperly tight. Judge Benedict found that the damage was caused by a latent defect in the rivet, but that the ship was relieved from liability by the exception of latent defects in the bill of lading; and as there was no evidence before the Court of improper construction of the limber boards, he made no mention of that subject in his decision (*Record*, p. 166; The *Carib Prince*, 63 Fed., 266).

The reasoning upon which Judge Benedict's decision proceeded was as follows (*Record*, pp. 167, 168):

"The evidence in respect to the rivet has led me to the conclusion that the cause of the accident was a defect in the rivet, arising from the fact that the quality of the iron had been injured by too much hammering at the

time it was annealing, so that it became brittle and weak. This defect could not be seen. The broken rivet was found on one of the bags of cargo, and showed that it had broken off in the countersunk part of the rivet, below the head, so that, while the rivet remained in place, no external examination would have discovered the defect.

"This defective rivet was, in my opinion, the cause of the accident. * * *

"If diligence on the part of the shipowner to provide a seaworthy ship, and a justifiable belief on his part that his ship was seaworthy, could avail to relieve him from his warranty of seaworthiness, he could be relieved upon the proofs in this case; but the rule has been declared that if the unseaworthy condition arose from a defective construction, although latent and unknown to the owner, he is not excused. The shipowner must show affirmatively that his ship was seaworthy at the beginning of the voyage.

"The question then arises whether this obligation on the part of a shipowner has been qualified by the clause in the bill of lading which exempts the shipowner from damage caused by a latent defect—which is this case. This was an English ship, the contract was signed in a port governed by English law, and it has been held in this circuit that such a case is to be governed by the law of the place where the contract was made. It was a British vessel, governed by the laws of England.

"Liverpool and Great West. Steamship Co. *vs.* Phenix Ins. Co., 129 U. S., 397; *The Majestic*, 60 Fed. Rep., 624; App., 282–295.

"The law of England, as declared in the case of The Cargo *ex Laertes*, 12 Prob. Div., 187, is to the effect that by the laws of England such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the shipowner. Applying that law to this case, it follows from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libelant's cargo, because the danger arose from the latent defect in the rivet which gave way, within the exception of the bill of lading under which the merchandise was carried.

"Upon this ground the libels are dismissed, and with costs."

(8.) The libelant thereupon appealed to the Court of Appeals, and assigned the following errors (Record, p. 171):

"FIRST.—The District Court erred in holding that the steamship Carib Prince was not liable to the libelant for the damage of her cargo alleged in the libel.

SECOND.—The District Court erred in holding that the exception of latent defects in the bill of lading exempted the steamship from liability to the libelant.

THIRD.—The District Court erred in not holding that the steamship Carib Prince was unseaworthy at the time she sailed with the cargo on board, of libelant, and that such unseaworthiness caused the injury to libelant's cargo.

FOURTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the *construction* of her ballast tank, which caused the injury to libelant's cargo.

FIFTH.—The District Court erred in not holding that the said steamship was unseaworthy in respect to the construction of her floor over her bilges, which caused the injury to the libelant's cargo.

SIXTH.—That the said District Court erred in dismissing the libel, and should have awarded a decree in favor of libelant for the damages sustained to her cargo."

(9.) Attention is called to the fact that no errors were assigned to the conclusions of Judge Benedict (1) that the shipowner had used due diligence to make the ship seaworthy, and (2) that the primary cause of the damage was a latent defect which "arose from a defective construction."

The "fourth" assignment indeed expressly admits that the defect was "in respect to the *construction* of her ballast tank." It appears, therefore, that the two points upon which the libelants' argument chiefly rests in this Court, namely, that (*a*) the defect in question was not a latent defect, and (*b*) that the owner had not used due diligence in inspecting or testing the tank in order to make the ship seaworthy, were not raised in the Court of Appeals by the assignments of error, the stress of the argument there having been laid, as appears from the opinion (pp. 211, 214), upon the effect to

be given to the exception of "latent defects" in the bill of lading, and to the provisions of the Harter Act.

(**10**.) The Court of Appeals affirmed the decree of the District Court upon substantially similar reasoning to that adopted by Judge Benedict, and further held that the introduction in the bill of lading of an exception of "latent defects," was not prohibited by the second section of the Harter Act (The *Carib Prince*, 35 *U. S. App.*, 370).

The main grounds of the decision in the Court of Appeals was stated by Judge Shipman as follows (Record, p. 212):

"The testimony clearly showed that abundant diligence was used in the construction of the vessel, that the defect in the rivet was a latent one which occurred at the time of the vessel's construction, which was not discovered and was not discoverable at that time, or subsequently, by the exercise of all the known and customary tests and methods of examination, which were all employed; that it was a latent and undiscovered defect in the hull of the vessel at the commencement of the voyage from Trinidad, that, consequently, the vessel was not, at said time, seaworthy, and that the injury occurred solely through this unseaworthiness and not by reason of filling the tank injudiciously.

"The main question in the case is whether the bills of lading expressly or clearly limited the implied and absolute warranty of seaworthiness, which is that the ship was in fact seaworthy at the commencement of the voyage, and is a warranty against latent, unknown and not discoverable defects (The Edwin I. Morrison, 153 U. S., 199; The Caledonia, 156 U. S., ; The Glenfruin, 10 Prob. Div., 103). The recent case of the Caledonia, *supra*, declared that exemptions in bills of lading which limit the extent of this implied warranty, must be expressed in clear terms, or they 'will be construed strongly against the shipowner,' and consequently held that an exemption which excluded loss or damage from defects in steam boilers and machinery, did not mean defects existing at the commencement of the voyage, and thereupon did not protect the owner from liability for unseaworthiness.

"The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is whether this language does not necessarily mean defects existing at the time of shipment, and therefore whether

it does not clearly and even expressly exclude unseaworthiness arising from such defects.

"The only case in which the effect of an exemption of 'latent defects' is discussed, is the Laertes, 12 Prob. Div., 187, but in that case the language of the bill of lading was 'latent defects * * * even existing at the time of shipment,' so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that the latent defects must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been not discoverable at the time of the shipment. It could not in its nature have been capable of discovery then and have become capable of evading discovery subsequently. A construction which should say that latent defects meant those only which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the schoolmen, and if latent defects existing upon the voyage are exempted, those existing at the time of the shipment are included, for they are the same.

"We concur with the experienced District Judge, that the exception 'limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner.'

"It is insisted by the libelants that the second section of the act of February 13, 1893 (27 U. S Stat., 445), commonly known as the Harter Act, prohibits any clause in a bill of lading which limits the implied warranty of seaworthiness. The section is as follows.

"'Sec. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document, any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.'

"Waiving the question whether this section applies to a foreign contract entered into by owners who are foreigners, the section does not bear the construction placed upon it by the libelants, which is that a comma shall be inserted after the word 'diligence,' and that the clause re-

specting seaworthiness shall be read as a prohibition of any covenant or agreement 'whereby the obligations of the owner of said vessel to make said vessel seaworthy, &c., shall in anywise be lessened.' The language of the section, as passed by the House of Representatives, permits this construction, but in the Senate, the words 'exercise due diligence' were inserted prior to the words 'properly equip,' and the evident intent of the section as amended and the effect of the amendment was to prohibit covenants whereby the obligation of the owners to exercise due diligence *to* properly equip, man, provision and outfit his vessel and to make her seaworthy should be lessened. A like amendment was inserted in the third section, which provided that if the owner exercised due diligence to make the vessel seaworthy, he should not be responsible for damage resulting from subsequent faults in navigation. These amendments indicate the intent which ran through the act as it left the Senate, and make it plain that one design of the act as amended was to permit the owner to relieve himself from the rigidity of the warranty of seaworthiness, but not to permit him to lessen his obligation to exercise due diligence in all respects at the inception of the voyage."

From the decree of the Court of Appeals entered pursuant to the foregoing decision, the libelants sued out this writ.

ARGUMENT.

The first matter for determination is: What was the proximate cause of the damage? The contentions in this brief, with regard to that, will be that it was either (*a*) the improper filling of the tank at sea, while the ship was rolling, or some negligence attending that operation, or (*b*) a latent and undiscoverable defect in the rivet which impaired its strength. If it was either of those causes, the loss would fall within the exceptions of "acts, neglects or defaults in the management or navigation of the vessel," or of "latent defect." If there was no negligence, and the rivet was not substantially defective, the loss would be due to "an accident to * * * hull or its appurtenances" within that exception.

On a finding that the loss was one excepted by the bill of lading the burden of proof would be shifted upon the

libelant, to show some reason why the vessel should not have the protection of those exceptions. This burden the libelant attempts to sustain by seeking to establish unseaworthiness. The claimaint maintains, however, that the ship was not in fact unseaworthy. But if the Court should consider the defective rivet made the ship unseaworthy, it is proposed to maintain that the exception of "latent defects" was designed to and does modify the implied warranty of seaworthiness, and that the ship is entitled to the benefit of the exception of "latent defects", even though she be found to have been unseaworthy, provided the owners used due diligence to make her seaworthy. Such diligence, it is contended, was exercised.

The claimant will also maintain that the second section of the Harter Act does not prohibit the introduction of an exception of "latent defects" in any case, and especially in a case where the contract is made abroad, and valid where made. If the proximate cause of the damage be deemed to be the improper filling of the tank at sea, or any negligence attending that operation, the ship would also be exempted by the third section of the Harter Act.

It will also be contended that the Act operates, in effect, as an exemption from latent defects, by substituting as the measure of the shipowner's duty, with regard to seaworthiness, a warranty of diligence to make the ship seaworthy, instead of an insurance to that effect.

POINTS.

I.

The proximate cause of the damage was the negligent filling of the tank at sea while the ship was rolling without taking adequate precautions to avoid damage. This was "an act, neglect, or default of the master or crew in the management or navigation of the ship" within the exception contained in the bill of lading.

(I.) That the proximate cause of the rivet giving way was the act of filling the tank at sea, while the ship was rolling, would seem to follow from the impossibility of finding, in the evidence, any other adequate cause.

The testimony shows, and both the lower courts have found, that the damage was caused by the breaking of a rivet in the collision bulkhead, about two feet from the ship's side, and five to seven feet from the floor of the hold (pp. 95, 88, 40, 41). Only the head of the rivet broke off (p. 42). This head was found on top of the cargo directly below the hole; it showed a clear, fair break. The circumstances indicated that it had broken off in the filling of the tank.

Chief Engineer Keeys, an expert called by the libelant, who examined the face of the break on the rivet head, testified that the quality of the iron was not good; that it was inferior, short and brittle, without fibre. He said this condition might have been produced by too much hammering when the rivet was annealing; and that it *had* the appearance of a crystalline character, with short and brittle fibre, such as would have been produced by too much hammering as the iron was cooling off when the rivet was originally headed up (p. 48; to the same effect, *Sharpe*, p. 77; *Quinn*, p. 115). It was evidently the opinion of Mr. Keeys that this brittle, fibreless and crystalline character of the iron was the cause of the rivet head breaking off. No other conclusion is fairly to be derived from his evidence.

But the other proof in the case shows that the rivet, brittle as it was from the beginning, had three months before withstood the usual and customary tests applied to determine its soundness and its strength. Three tests had been applied: (1) the knife test (pp. 63, 69); (2) the hammer test (pp. 69, 63, 74); (3) the water test, tried twice (pp. 74, 79, 69). These tests, applied by the builders (p. 63), the shipowner's representative (pp. 69, 79) and the surveyor to Lloyds' Register, under whose supervision the vessel was built (p. 74), showed that this rivet, with all its alleged faults, was of sufficient strength to be classed as a sound and seaworthy rivet.

The water test of the peak tank was tried, not only to determine the tightness of the collision bulkhead, but also its strength. Hydraulic pressure was put upon the bulkhead by the standing-pipe test required by Lloyds' classification rules. In this test the tank is filled with water to the very top, and a stand pipe is put in on top, five or six or seven feet high. When the water comes over the top of that pipe, it is said to have its pressure on, which tests all the workmanship and material and everything in connection with the tank, and proves it fit to hold and carry this depth of water (*Congdon*, p. 52).

Mr. James, the architect of the ship, says (p. 79):

"I was present when the tank and bulkhead were tested by filling the tank with water to about a foot above the main deck. [This would be seven or eight feet above the between-deck, which formed the top of the tank.] I calculated the pressure thus exerted, and found it to be 96¾ tons total pressure on the bulkhead. *That is in excess of Lloyds' requirements.* The bulkhead was thoroughly tight, and stood the test satisfactorily without showing any signs of weakness or leaking."

Mr. Sharpe, the Lloyds' surveyor under whose supervision the ship was built, says (p. 74):

"There were two water tests, and I was present at both. *Those were the usual tests.*"

The foregoing evidence, not in any way disputed, proves that, in the judgment of the most competent experts, this bulkhead, including the rivet in question, was of

more than sufficient strength to withstand the pressure which would ordinarily be exerted in the proper use of the tank. This is the criterion of seaworthiness (The *Titania*, 19 Fed., 101, 107; *Svensden* v. *Stursberg*, 31 Fed., 86; *Rev. St., U. S.*, §§ 4556-4561; cases *post*, p. 56).

The bulkhead in these tests withstood a pressure of $96\frac{3}{4}$ tons. It is obvious that the mere weight of 83 tons of water, lying still in the tank, would exert far less than $96\frac{3}{4}$ tons pressure against the bulkhead. If the entire weight of the 83 tons of water had rested wholly on the bulkhead, it would have presented a pressure less than its tested strength. Therefore, unless the rivet had in some way become weakened between the tests in Sunderland in June, and the pressure under which it broke in September, a very large volume of water must have been thrown against the bulkhead with great force, creating an extraordinary strain in order to break the rivet (The *Exe*, 14 U. S. App., 626).

Is there any *evidence* of any intervening weakening of the rivet? The appellant does not refer to any in either of her briefs. There is not so much as a suggestion anywhere *in the testimony* that the rivet was in any different condition on sailing from Trinidad than when it was when tested in Sunderland.

But it is suggested in argument, without basis in the proof, that the rivet may have been injured in the straining of the vessel during a hurricane a week before the beginning of this voyage. This suggestion should not be received for several reasons.

In the first place, the position of this rivet was not such as to cause a strain to be exerted on it at the place where it broke by the mere working of the ship in heavy weather. It was not in any junction of the bulkhead plates. It went through the center of a plate and through a horizontal knee tie or strap, a right angled piece of iron, one side of which was riveted to the bulkhead, the other to the ship's side. But this was not the only means by which the bulkhead was attached at the side. It could only be made watertight where it joined the ship's side, by means of perpendicular angle irons, riveted not only to the bulkhead plates but to the side plates.

Now any working of the ship in storm would certainly

produce the greatest strain either on the bulkhead at its junction with the ship's sides, or at the places where the bulkhead plates were riveted together. Such strain, at least on the bulkhead plates, would be a shearing, rather than a tensile strain, and would have tended to shear off the rivet, in the middle, rather than to make the head jump off (*Quinn*, p. 115). But the evidence disclosed no breaking of the rivets which joined the bulkhead plates together, or to those which joined the sides of the bulkhead to the sides of the ship (pp. 90, 93). The character of the damage was such as indicated a strain from forward, aft, instead of athwartships.

These circumstances plainly indicate that the rivet was broken by heavy pressure of surging water in the tank, bringing unequal strains upon the bulkhead during the process of filling, rather than that it had been weakened by previous thwartship strains, put upon the bulkhead by the working of the ship in heavy weather.

Moreover the evidence is distinct that the weakness which led to the break of the rivet instead of being due to a strain was a *structural weakness*, a brittleness and crystalline character of the iron, caused by an excess of hammering when the rivet was put in (p. 48).

Finally, it is inconceivable that the plating of the bulkhead could have been so strained as to impair the strength of the rivet, when the more brittle and inelastic Portland cement covering of the bulkhead on the inside was not even cracked in the neighborhood of the rivet, or elsewhere on the bulkhead (pp. 44, 45, 46).

(**2**.) The expert evidence tends to show that the rivet broke from excessive and unnecessary strains from inside the tank.

(**a**.) Libelant called a shipbuilder of long experience, Mr. Quinn, who expressed this opinion (pp. 115, 116):

"If the last rivet, which connects the bulkhead of a tank with the angle iron fastened to the knee-tie, breaks off, what, in your judgment, would be the cause of that breaking, if it was known to you that the holes of that rivet didn't fair? A. I would consider as long as the hole wasn't fair that probably it was crystallized; the rivet

was probably broken after the tank had been made. Again, there is another cause for that. In fairing a hole like that, the rivet came in at an angle, and when the rivet was driven in, it was driven when it was too cold and crystalized, because sometimes when the rivet does not come in very hot they will drive it anyhow, when it is black, especially when they are doing piece work, and that rivet probably broke in the centre, and both sides had stayed in the hole.

By the Court:

Q. If under such circumstances it broke, it broke exactly in the centre? A. In the centre between the two plates.

Q. That is where it would break? A. That is where it would break, and both pieces remain in there.

By Mr. Black:

Q. In this particular case, the rivet head broke at the outside of the tanksheet or bulkhead? A. The clinch came off?

Q. And when that rivet was driven out of that hole, if it was found the *hole did not fair*, and it was the extreme rivet, the innermost rivet of the knee-tie, *what would you say would be the cause of that breaking off?* A. *Extra pressure in the tank.* * * *

Q. *What is the way in which that strain comes to produce the breaking of the rivet?* A. *By an extra strain inside of the tank, if the tank wasn't full of water.*

Though libelant had two other experts on the stand—Captain Legge and Chief Engineer Keeys (witnesses who were not biased in favor of the claimant by any relation of employment, p. 86)—neither of them was asked his opinion as to the cause of the rivet breaking. It is to be inferred from the evidence of Keeys that he thought it broke because of the defective quality of the iron (p. 48); but neither of them stated his opinion on this subject distinctly.

(**b**.) The claimants' experts were of opinion that the rivet had broken from some unusual strain at the time it gave way.

Mr. Sharpe, Lloyds' surveyor at Sunderland, a man of great experience (p. 74), says:

"I can only account for any damage having arisen to the fore peak by the peak having received some *unnecessary* strain or concussion of some sort."

Such was also the opinion apparently of Mr. Congdon Lloyds' surveyor at New York (pp. 133, 135), and of Captain Saunders, superintendent of the Prince Line at New York (pp. 86, 139). See also *Quinn*, p. 123.

(3.) The uncontradicted evidence shows it was very improper and unsafe to fill the tank at sea with the ship in motion.

Thomas Congdon, a shipbuilder by training and Lloyd's surveyor for thirty-eight years (p. 50), testified on this point as follows (p. 133):

"Do you know whether there is any rule amongst navigators as to filling tanks at sea; whether a vessel should be stopped, or whether they can fill them in motion? A. The rule of common sense is the only rule I know about. It is a very unwise thing to fill a tank at sea.

Q. What do you say as to the prudence of filling a tank with the ship going ahead? A. I should say it was a very improper thing to do.

Q. Why? A. Because when the tank is partly full of water and the ship is in motion, it swashes up, and is liable to break on (down) the bulkhead. I have seen a bulkhead knocked flat on the ship's bottom, where the tank has not been full, the ship rolling and water swashing knocked the bulkhead down."

Cross-examined (p. 135):

"Q. Do you know anything about hydraulic pressures? A. Tell me what you want to know?

Q. Do you know how many additional pounds or tons pressure is brought on a bulkhead by the increase of one foot in a standpipe [an allusion to the mode of testing tanks in new ships, fol. 155]? A. Yes, sir.

Q. In a bulkhead of the size of that of the tank of the Carib Prince, how much additional pressure would be brought on that bulkhead? A. I must know the area of the bulkhead.

Q. You saw the bulkhead, didn't you? A. I will tell you that about six or seven or eight inches rather, in this standpipe, would be about a pound pressure on each square inch of the bulkhead, and you can calculate the whole thing.

Q. Would a pressure of that much on that bulkhead be as great as, or greater than, the pressure caused by the

water being in movement, when the tank was not full? A. Nothing to compare it to; you can't compare the two.

Q. *You think there is nothing in the nature of forces that you can compare between pressure and impulse?* A. *The swash is the more severe of the two on the bulkhead, most decidedly.*

Q. If the sea is smooth, and the steam vessel is not rolling, would the tanks suffer any extraordinary strain by being filled at sea? A. If the water is perfectly smooth, of course it could not suffer. If there is motion of the ship, either *rolling* or plunging, *it naturally would.*

Q. If there is no such motion, there is no danger of that? A. Quite so.

Q. *It is due to the surge of the water coming with an impact on the bulkhead?* A. *Exactly.*

Q. Would not such an impulse as that have a tendency to snap off a great many heads of rivets? A. *I have seen a bulkhead knocked right down.*"

Frank S. Martin, a marine engineer and surveyer of fifteen years' experience, also a shipbuilder by training (p. 90), testified (p. 91):

"Q. What do you say as to its being a prudent thing to fill such a tank without stopping ship? A. I say it is not prudent.

Q. Why? A. The immense volume of water there is pressing against the bulkhead with the motion of the ship going through the water."

Captain Saunders, a master mariner, who had been in command of steam vessels with this class of tank (p. 86), now superintendent for the Prince Line, which operates about fifty steamers (p. 84), testified (p. 86):

"Q. Can you say whether or not it is a prudent thing to do, to fill the peak tank at sea without stopping the ship? A. It is not. The proper thing is, a ship should be stopped and perfectly still. It is a very unwise, unsafe thing to do on account of the strain, *the motion of the water causing heavy strain on the bulkhead.*"

This, as Mr. Congdon well said, is "the rule of common sense." It is also the rule of which a skilled master should know and observe. It is enjoined upon mariners by the hand books issued for their guidance. Thus, in *Mitcalfe's*

Suggestions to Mariners (4th Ed., Newcastle-on-Tyne, 1886), it is said:

"No. 20. The captain of a steamer well loaded with grain or other perishable cargo, disc just awash, should not be persuaded while steaming at sea to fill any of the ballast tanks under the cargo to alter the trim and increase the speed; success is doubtful at the best, while even if the tank is tight to commence with, the engineer will probably leave the sea cock open after the tank is full and strain it. Certainly a claim for damage to cargo will result and may, perhaps, be the most fortunate result of a reckless and wilful act of improper navigation."

"No. 30. It is time enough to think of filling the tanks *when required to stiffen the vessel.* * * * Let the captain think twice before doing it, and reflect that he opens a three-inch hole in one bottom without seeing the other one, or knowing where the water goes. Being in charge of many lives and of valuable cargo, he will do well to watch this risky operation from start to finish and himself order the sea cock to be closed, or see it done, or he may find himself personally liable if damage results from neglect of this precaution.

"No. 109. Remember also, that it is *exceedingly dangerous to run up your ballast tanks at sea when the vessel is rolling*, as there may be difficulty *in filling* them, or the tank top may be injured by the water rushing from side to side."

(**l**.) The tank was negligently filled so as to bring unusual and unnessary strains on the bulkhead.

The ship was rolling at the time. The motion thus given to a large body of water would cause heavy strains at the acute angles of the tank formed by the bulkhead and the narrowing sides of the bows.

(**a**.) It is stated that the tank was filled on the evening of September 3d. The work was begun in the mate's watch, which was from 4 until 8 P. M. (p. 102), and occupied about 6 hours (p. 102). Though the duty of seeing that the tank was properly filled, belonged to the mate (*Legge*, p. 11; *Hopkins*, p. 110) he says he was not on deck when it was finished (p. 102). The carpenter, whose duty it was to take soundings during the filling process (p.

110), had gone to bed, leaving word with a seaman to call him when it was full (p. 108). He says he was called, examined it and found it full (p. 108), but it does not appear that he took any soundings at that time in No. 1 hold. Hence it is not known definitely whether the tank was then leaking or not From the quantity of water found in it the following morning (pp. 17, 110) the presumption would be that it was.

(**b.**) Taking the mate's statement that they began filling the tank in his watch from 4 to 8 P. M. September 3d, and that the operation took six hours, it is obvious that it could not be full before 10 P. M. The master says it *was* full at that hour (p. 27).

The only record in either of the logs touching the filling of the tank is in the engineer's, where, opposite the hour of 9 P. M., September 3d, an entry appears: "Pumped up fore peak tank." In the same watch, he has the entry: "*Ship rolling.*"

Although the mate testifies that at the time the tank was filled the *weather* was fine, he says nothing about the sea or the rolling of the ship. His log, however, shows (p. 159) that on that afternoon and evening they had "brisk breeze," "strong breeze," and later, "fresh breeze" from E. by N. to E. N. E., while their course was N. W. by W. and N. W. by N. 1/2 N. This gave them substantially a beam wind, and would naturally produce the effect recorded by the engineer—"ship rolling." As there is no evidence to contradict the engineer's entry, and the force and direction of the wind seem to confirm it, the fact should be accepted that the ship *was* rolling.

Mate Scott says the ship was not stopped while the tank was being filled (p. 102). If she was rolling at the time, the failure to stop made the fault no worse; but according to the uncontradicted evidence of the experts, (*ante*, p. 21), it was a fault to fill the tank at all at sea, unless the ship could be stopped, and when stopped would be still.

The evidence as to the length of time the water was left in the tank is not satisfactory. The carpenter, whose

business it was to watch the process (p. 110), says that it was filled one night and found leaking on the next morning (pp. 108, 109), and there are statements in the master's evidence to the same effect (pp. 11, 16, 108, 119).

Captain Legge testified (p. 11):

"Q. On what day was that filled? A. On Sunday night, the 3d of September. * * *

Q. When did you first find out that it was defective? A. By sounding the tank the *next morning*.

Q. What did you discover by sounding it? A. Discovered that the tank was not full when it had been full the *previous night* after filling it."

(At p. 16). Q. When you went down into the No. 1 hold, what time of day was it? A. The first thing in the morning.

Q. Of the *4th of September?* A. Yes, sir."

The carpenter, Hopkins, testified (p. 108):

"Q. Do you remember on what day this leak was found? A. I think it was a Monday morning.

Q. How long before that had the tank been filled? A. I think it was Sunday night, but I am not sure about that.

Q. The night before you sprung the leak? A. Yes, sir."

(P. 109). When I sounded at night, when I knocked off, the tank was full, and the *next morning* I sounded the tank and I found a deficiency in the tank; then I went to the limbers and I found there was water in it. I then informed the chief officer, and he and me went down and found water in the No. 1 hold."

The engineer, on the contrary, has recorded that the water was in it from the evening of September 3d until the morning of September 5th (pp. 162, 164). But the entry of filling the tank looks as though it had been recorded after the entries for that day had been finished. In all other instances on the three *facsimile* pages of his log (pp. 162, 163, 164), his entries are begun opposite the hours at which the different watches commenced, namely, 1, 4, 8, 12, while opposite the beginning of the watch, 8 P. M., September 3d, two dashes had been drawn, apparently to indicate a blank, and the entry of "Pumping up the peak tank" was put opposite the second hour of that watch. It cannot be that this was the

record of the time when the pumping up of the tank was begun, because that was in the watch which ended at 8 P. M. (p. 102); occupied six hours (p. 102), and was finished at 10 P. M. (p. 27).

It is to be inferred that the engineer had no entry in his log of the filling of the tank until after he found it necessary to enter the leak next day and the fact of pumping the tank *out;* and that either through inadvertence or by design, he went back and entered the time of filling so as to leave a day between the two operations, and thus create an impression that it had not been broken by the negligent mode of filling it.

(**c**.)—There was not the least pretext that the tank was filled under the stress of any real necessity. The master, who was not the servant of the shipowner, attempted to justify his use of the tank by saying it was to correct the trim; but from his evidence, the trim was not unusual (pp. 14, 27), and both he and the mate concede that it was filled in the expectation of bringing the ship's head down only six or eight inches, to make a trifling gain in speed.

Mate Scott (p. 102) said:

"Q. What was the occasion of filling it? A. Because the ship was so much astern, we thought she would go easier - steam better."

Captain Legge (p. 14) testified:

"Q. How did you come to fill up this tank on the third of September? A. On leaving Grenada, the vessel was three (two) feet by the stern, and proceeding to New York, every day using coal—burning coal—puts her more by the stern

"Q. It lightens her up forward? A. I considered it absolutely necessary to fill this ballast tank to keep the vessel in trim.

"Q. Had you a cargo on board? A. Yes, sir.

"Q. What was the draft when you left Grenada? A. 14 feet 10 forward, 16 feet 10 aft.

"Q. Had you had a cargo on the voyage from New York to Trinidad also? A. Yes, sir."

(Page 27.) "Q. What was her draft on the voyage down? A. 15 feet 3 forward, 17 feet 4 aft (two feet one inch by the stern).

"Q. On the voyage from Trinidad or Grenada to New York, on which this occurrence happened, her draft was 14 feet 10 forward and 16 feet 10 aft before you put the water into the tank? A. Yes, sir.

"Q. When you put the water into the tank, what was her draft? A. We were at sea then, and we could not ascertain exactly the draft; that tank ought to tip her six or eight inches.

"Q. When you emptied the tank, you came to New York without anything there? A. Yes, sir.

"Q. You did not shift any cargo? A. No, sir.

"Q. And did not change the trim of the vessel at all? A. I had no other way to do it.

"Q. And you arrived in safety? A. Yes, sir: only she didn't steam as fast; that is the only thing; the runs in the log book will show that.

"Q. Give me the precise hour at which this tank was filled up on the third of September? A. 10 P. M. of the 3d; it was emptied at 6 A. M. of the 5th. The tank was filled for a period of thirty-two hours.

"Q. What was the speed you made while the tank was filled? A. 247 miles the first twenty four hours; the next day's run was 246, an average speed of about $10\frac{1}{4}$.

"Q. What was the speed during the next twenty four hours? A. 241.

"Q. That was when the tank was empty? A. Yes, sir."

(**d**.) If it be considered that in addition to the examination made of the interior of the tank by the engineer after the storm in August (pp. 43-46), it should have been tested by water before sailing from Trinidad, one or two further considerations should be adverted to.

It seems plain that the duty of testing the tank with water at Trinidad, if it rested upon anybody, belonged to the captain; and he was aware when he proposed to fill it up on September 3d that no such test had been made. If, as a reasonably prudent captain, he was bound to test it with water in Trinidad, then, of course, he was bound to refrain from filling it with water on the voyage, except under stress of some extreme necessity, and if he filled it at all, should have stationed a watch in the No. 1 hold to see that the tank did not leak when it was filled.

The length of time that the water remained in the tank has a bearing in considering this aspect of the master's duty.

If it remained there thirty-two hours before the leak was discovered, as the master says (p. 27), and if the soundings were taken with regularity during that time, especially on the morning and evening of September 4th, in accordance with the rule prevailing (p 97), and as the carpenter testifies they were (Hopkins, p. 102), then it is clear that the rivet did not break in the filling of the tank on September 3d. But if it did not break then, obviously it would not have broken and disclosed a defect by merely filling it in Trinidad. There was no breach of duty or want of diligence in failing to fill it there.

If, on the contrary, the water was not in the tank thirty-two hours, but the leak was discovered in the morning after the tank was filled, then it seems reasonably certain that the rivet broke in the process of filling, and that a watch in the hold would at once have detected the leak, and thus avoided the damage. The proximate cause of the damage, therefore, was the wrongful act of the master in filling the tank at sea at the time he did, without having applied the water test in Trinidad, or without having a watch in the hold during the time it was being filled (*Hedley* v. *Pinkney & Sons S. S. Co.* [1892] 1 Q. B., 56, 65; [1894] A. C., 222; *Ins. Co.* v. *Transportation Co.*, 12 Wall., 194; *Orient Ins. Co.* v. *Adams*, 123 U. S., 67; *Transportation Co.* v. *Downer*, 11 Wall., 129; *Railroad Co.* v. *Reeves*, 10 Wall., 176; *Morrison* v. *Davis & Co.*, 20 Pa. State, 171; *Scheffer* v. *Ry. Co.*, 105 U. S., 249; *Northwestern Transportation Co.* v. *Boston Marine Ins. Co.* (the *Ontario*), 41 Fed., 793, 808; *City Fire Ins. Co.* v. *Corlies*, 21 Wendell, 367, 369, 371; *Lewis* v. *Springfield Fire and Mar. Ins. Co.*, 10 Gray, 159; *Kenniston* v. *Merrimack Ins. Co.*, 14 N. H., 431; *Babcock* v. *Montgomery Ins. Co.*, 6 Barb., 637; *Grim* v. *Phœnix Ins. Co.*, 13 Johns. Rep., 451).

Such a watch could have been readily maintained, since the cargo was only about six feet deep in the lower hold, and the circumstances attending an actual discovery of the leak (pp. 17, 40, 41, 88, 95), indicate that it would have been easily detected.

(5.) The conclusion from the foregoing facts is that a sufficiently good rivet broke from a wrong use of the tank, and that accordingly the loss should be regarded as due to "an act, neglect or default of the master or crew, in the management or navigation of the ship," within the exemptive clause contained in the bill of lading.

This bill was issued in Trinidad, a British possession, for the transportation of goods upon a British vessel. The damage occurred on the high sea. In these circumstances, the contractual rights and obligations of the parties under the bill of lading are to be determined according to English law (The *Titania*, 19 Fed., 101; *Liverpool Steam Nav. Co.* v. *Phenix Ins. Co.*, 129 U. S., 397; *Foncesca* v. *Cunard S. S. Co.*, 153 Mass., 553; *O'Regan* v. *Cunard Co.*, 160 Mass., 356). By a stipulation entered into on a trial in the District Court (p. 7), "it is admitted that under the English law *the language of the bill of lading made a valid contract.*" It is no longer against the public policy of this country to uphold exemptions from faults or errors in the management or navigation of a vessel, since, by the third section of the Harter Act, similar exemption is afforded by statute (2 Supp. R. S., p. 81).

II.

If negligence in filling the tank was not the proximate cause of the damage the loss would be within the exemptions of "accidents to * * * hull, tackle, boilers and machinery, or their appurtenances" and "accidents of the seas, rivers or steam navigation of whatever nature or kind."

It was held in the courts below that the Master made a justifiable use of the tank, in filling it as he did, and was not chargeable with negligence in that particular (pp. 167, 214). Both Courts found that the loss was within the exception "of latent defects" (pp. 169, 213). The claimants urged below, and maintain here, that the defects in the rivet were

trifling and immaterial; but in any event, the loss would be deemed to be within the above quoted exception. Even though a latent defect may have contributed to the result, it would still be "an accident to the hull and its appurtenances," and a "danger of the seas and of steam navigation." The *Thrunscoe* [1897], Prob., 301. The materiality of the inherent defect would relate only to the question whether the owner, by the exercise of reasonable care and diligence, could have discovered it, and whether the want of such care should deprive him of the benefit of the exception (The *Miranda*, L. R., 3 A. & E., 561; *Nine thousand Bunches of Bananas*, 8 U. S. App., 405; The *Curlew*, 51 Fed., 246; The *William Lindsay*, L. R., 5 P. C., 338; The *Virgo*, 3 Asp. Mar. Cas., n. s. 285; The *Xantho*, 12 App. Cas., 503).

In the case of *Nine Thousand Bunches of Bananas*, 8 U. S. App., 405, a steamship, under time charter, broke the junk ring of her high pressure cylinder, after encountering some roughness of sea, whilst on a voyage towards the port where she was to take on a cargo of green fruit. The charter-party excepted "all dangers and accidents of the seas, rivers, machinery, boilers and steam navigation." In consequence of this delay, her cargo of fruit, which had been cut in anticipation of her earlier arrival at the port of loading, was over-ripe and damaged on reaching its port of destination. In the course of the opinion delivered by HUGHES, District Judge, the Court of Appeals (pp. 407, 408) said:

"The great preponderance of evidence shows that the breaking of the junk ring in one of the cylinders in the engine of the *Curlew* was an accident that could not be foreseen; that there was no flaw in the ring that could be detected in examining its broken pieces after the accident; and that from its having performed its function without jar or fault for six days of the voyage anterior to the accident, the inference is reasonable that its breaking was from some cause exterior to itself, and not from any defect of its own, and, therefore, this breakage was one of those *accidents of the sea* and *of the machinery of the ship*, from the consequences of which the charter-party exempted the ship."

In the *Miranda*, L. R., 3 A. & E., 561, a steamship laden with a general cargo, became disabled at sea, in consequence of her machinery breaking down. Her cargo had been shipped under bills of lading which contained among the excepted perils "accidents from machinery." Another steamship belonging to the same owners fell in with the disabled vessel and towed her into safety. The question before the Court was whether the owners of the vessel rendering the service were entitled to recover salvage remuneration against the cargo laden on board the disabled vessel. Sir R. Phillimore held (pp. 566, 567):

"If I am to decide the question whether the owners of the Roxana are entitled to salvage reward, I must first determine whether they are so entitled apart from the question of their being the owners of the vessel salved. I think unquestionably they rendered a salvage service entitling them to salvage remuneration, unless peculiar circumstances have rendered it impossible for them to recover that remuneration.

"It becomes necessary, therefore, to decide the question of law. The contract set out in the bills of lading is that the Miranda should take her cargo on board, and deliver it at the port of London in the like good order and condition as shipped; then follow many exceptions which are to be considered as affording a justification for the non-performance of the contract, and among these exceptions is included one about which there has been much discussion. This exception, which is contained alike in all the bills of lading, though not always expressed in precisely the same words, is as follows: 'Accidents from machinery.'

"If I had to determine the case upon the point raised with reference to the alleged implied warranty of seaworthiness, I should rule that the burthen of proving the breach of such warranty rests with the defendants, and that sufficient evidence as to the vessel's state, and the state of her machinery, has not been given to lead the Court to find that she was in an unseaworthy condition at the time the cargo was shipped. But I think the true question in the case is—Does not the exception 'accidents from machinery,' include the present case? I think that I must come to the conclusion that the accident in question finds its place among the excepted perils; it is therefore unnecessary for me to discuss the able argument which has been addressed to the Court with respect to a warranty of seaworthiness being implied in the contract."

III.

If it be considered that the proximate cause of the damage was a defective condition of the rivet, such condition constituted a "*latent defect*" within the exception of "latent defects in hull, machinery, or their appurtenances," contained in the bill of lading.

In considering this point it is important to bear in mind the way in which the question arises.

The shipowner claims the benefit of an exception of "latent defects" contained in his contract. By force of the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee, liable only for negligence (*York Co.* v. *Central Ry.*, 3 Wall., 107, 112). The libelant seeks to defeat the operation of the exception by proving negligence. The question thus presented is, did the failure of the carrier to discover the defects in the rivet constitute negligence on its part? If the exercise of ordinary care would not have discovered it the failure does not amount to negligence. Hence, in considering the appellant's argument on this subject, it is to be borne in mind that the measure of the shipowner's duty was merely ordinary care—not the highest degree of care—much less that of warranty.

The rivet is claimed to have been defective in two particulars, (1) that the iron was brittle, fibreless and crystalline, due to an excess of hammering when it was originally put in (p. 48), and (2) in that the holes through which it passed were not true (pp. 49, 50).

The claimant maintains that both of these defects, if material, were latent in the sense that they were not discoverable by ordinary care.

(1.) A defective quality of the iron was proved by the libelant's witness, the chief engineer, who evidently attributed the damage to that cause (Keeys, p. 48). His evidence is not disputed. It must be assumed, therefore, that the iron was crystalline and in some degree lacked strength. It is not pretended, however, that this *qual-*

ity of the iron could have been detected, prior to the break, by any kind of a test.

(**2**.) The blemish with regard to the holes was testified to by libelants' witnesses Keeys (pp. 49, 50), and Clarke (pp. 118, 119). Keeys merely said the holes did not come true, and that the boilermakers cut them out and made them true when they effected permanent repairs (p. 50). The permanent repairs were not effected until the following January. In the interim, the holes were stopped up by a bolt and nut (pp. 84, 85, 87). Keeys drew no conclusion from this unfairness of the holes.

Clarke's testimony was as follows:

"Q. What was the difference of the untrueness of those two holes in respect of fairing? A. It did not appear to be fair in the hole between the two plates.

Q. How much? A. I did not measure it; I couldn't say.

Q. How much? A. About an eighth of an inch.

Q. (By the Court.) One plate slipped by the other an eighth of an inch? A. Apparently; *it was rounded on the edge of the inner plate.* * * *

By Mr. Kirlin:

Q. Did you put your fingers through that hole? A. Yes, sir.

Q. Was there a sharp edge to the inside of the hole on the angle iron where it came against the plate? A. It was battered, the iron was, on the inside plate. * * *

Q. Can you swear accurately as to how much the holes lacked of being fair? A. I could not; I did not measure it.

Q. Pretty hard work to swear between an eighth and a sixteenth of an inch, wouldn't it be? A. I think it would" (pp. 118, 119).

Captain Saunders also put his fingers through the holes. He testified (p. 88):

"By Mr. Black:

Q. Did you put your finger in the hole? A. I did.

Q. Did you go all the way through? A. Yes.

Q. Did you feel the angle iron at the back? A. Yes.

Q. And was all smooth and fair there? A. Except rusty; it was fair.

Q. The hole of the angle iron and the hole of the bulkhead were exactly in line, were they not? A. As I said

before, it may have been a shade out, but it was practically fair.

Q. Could you run your finger through it easily? A. I could with ease.

Q. Did you measure it? A. I did not. * * *"

"By Mr. Kirlin (p. 85):

Q. How were the holes? A. The holes were true.

Q. The holes in the knee-tie and in the bulkhead? A. Were practically true; they might be a shade out more or less.

Q. What is a shade? A. Say, might be a sixteenth of an inch.

Q. Does that make any difference in the strength of a rivet? A. It does not."

The libelants' expert Quinn, who testified that putting rivets through unfair holds tended to weaken them, so that they would break "*at the centre*" (p. 115), was questioned on this subject:

"By the Court: Q. *Would you reject a piece of work where a three-quarters of an inch rivet had been driven in hot, the hole not fairing from a sixteenth of an inch to a little more, perhaps?* A. *No, sir; it is done every day.*

Q. *And called good work?* A. *Yes, sir*" (p. 125).

It seems obvious from the circumstances that the different experts were able to put their fingers through the three-quarter inch holes (p. 17), that they could not have been very much out of line, or that the experts must have had very small fingers. It is also clear that three-quarter inch rivets could not have been put through three-quarter inch holes unless they were substantially fair (p. 56).

(**3**.) But if the brittle quality of the iron, or the unfairness of the holes, amounted to a substantial defect, nevertheless both were latent, in the sense that they could not have been discovered by inspection prior to the sailing of the vessel on the voyage.

(**a**.) This is proved by the libelants' own witness Keeys, who says:

"Q. *If there was any defect in that rivet*, which has been marked Claimant's Exhibit 6, before it fell off on to

the bag of cocoa, *would it have been discovered by inspection* from the No. 1 hold, looking at it as it was countersunken in place? A. *No, sir.*

Q. *Why not?* A. *Because the head of the rivet is hammered close to the face of the plate*" (p. 45).

It seems almost too plain for argument that the defects in the rivet (if they can be considered to be such, in view of the tests to which it had been subjected, and which it had withstood) were between its head which rested against the knee-tie on the side of the tank, and its point which had been hammered into the countersunken hole on the bulkhead side of the plate, so as to be level, or nearly so, with the surface of the plate (p. 45). The defects, therefore, if any, were out of view and beyond reach of any known test which would have disclosed the interior conditions. At least, there is nothing in the record to suggest that any known test would have disclosed them.

(**b.**) The defect was none the less "latent" in the sense of the exception, because the men who originally drove the rivet, may have known the holes were defective.

Appellant's argument assumes that although an existing defect in the vessel may be a latent defect, *as between the parties to the contract*, yet the law would not regard it as latent, if a third person, at some anterior time, may have known of it. But this bill of lading was made some time after the ship was built, and was in effect between the shipowner and Madam Wupperman. It evidently contemplated a state of facts which might then exist. By this provision the master in effect said to her shipper: "There may be latent defects in the hull of my ship that I do not know of, and which I cannot ascertain by inspection. For damages arising from such latent defects, which are not due to my fault, and which I cannot avoid, the ship will not be responsible." By accepting this bill of lading, the shipper in effect said: "For defects that are *now* latent in the hull, I agree the ship shall not be liable." To say that such a defect, which the shipowner did not know of, and could not discover after he had bought the ship, and at the time this contract was made, was not in fact a latent defect,

in the sense of the exception, merely because the machinist who drove the rivet may have known some months before that it was defective, is to disregard the obvious intention of the parties in introducing the exception, and to substitute for it a fictitious presumption of their intention.

(c.) The appellant also argues that in determining what a latent defect is, resort must be had to the law of latent defects, and that by such law nothing is a latent defect which human ingenity could possibly detect.

To this, it may be replied that, strictly speaking, there is no law of latent defects. Questions of responsibility for them arise more commonly with regard to the carriage of passengers, or in connection with injuries to servants or others, through defective appliances furnished for use in mercantile operations. But in all such cases the liability, if found, finally depends on the law of negligence, determined with reference to the degree of care required in the particular case. If the defendant was not wanting in such care, the plaintiff cannot recover merely because some servant of a reputable maker, from whom the defendant buys his appliances, may have been negligent (The *Benbrack*, 33 Fed., 687, 688; The *Dago*, 31 Fed., 574).

In the appellant's original brief (p. 13), detached expressions are cited from opinions in a number of cases with regard to the liability of carriers of passengers for defective car wheels, axles, &c.; but on examination, it will be found that these cases are not really authority for the proposition that the defects in this rivet were not latent.

The early English, Massachusetts and New York cases cited by the appellant, although not expressly repudiated by later decisions, have nevertheless been limited and distinguished (12 *Am. & Eng. Encyc. of Law*, 916). The sentences from the opinions which are quoted by the appellant are largely *obiter*. Most of the cases were decided when the doctrine of graded diligence prevailed. In the later cases, it has been held that, if the carrier purchases from reputable manufacturers, and gives the vehicles *such inspection as is usual* and practicable, he is not responsible for defects not so discoverable (*Readhead* v.

Midland Ry., 4 Q. B., 380; *Grand Rapids Railway* v. *Huntley*, 38 Mich., 537; *Nashville Railway* v. *Jones*, 7 Heiskell, 27; *Illinois Central* v. *Phillips*, 49 Ill., 234; *Allen* v. *Dry Dock Railway*, 19 St. Rep. (N. Y.), 114; *Carlson* v. *Bridge Co.*, 132 N. Y., p. 273; *Caril* v. *S. I. Railway*, 58 N. Y., 138; *Ladd* v. *New Bedford Ry.*, 119 Mass., 412). It is not the duty even of a carrier of passengers to adopt all such speculative and theoretical precautions as might be thought necessary by experts. The precautions necessary are those recognized by men of practical experience, and such as are usually adopted (*Robinson* v. *N. Y. Centl. Ry.* 20 Blatchf., 338, 340; *Texas Pacific Ry.* v. *Barrett*, 161 U. S., 617, 618).

These cases recognize the doctrine that negligence, not warranty, lies at the foundation of liability in actions of this kind, and hence that such carrier's obligation is measured by the exercise of that degree of care which is reasonably called for in the special circumstances—not by the very highest degree of care, as was intimated in some of the earlier cases.

Moreover, the analogy drawn from cases of carriers of passengers is very imperfect. Such carriers are held to a *high* degree of diligence, because of the risks to life that follow even slight relaxations of care. The question did not arise in any of the passenger cases cited, as to the effect of an express exception from "latent defects." The point in the present case is merely whether the defect in the rivet was such as to baffle *ordinary* care in inspection—the condition to be proved in order to bring the loss within the exception.

(**d.**) The question as to what constitutes a latent defect has been passed upon in a number of admiralty cases, where it has uniformly been held the shipowners measure of diligence to discover defects is the exercise of *ordinary* care. (The *William Lindsay*, L. R., 5 P. C., 338; The *Nederland*, 7 Fed., 926, Butler, *J.*; The *Dago*, 31 Fed., 574, Pardee, *J.*; The *Flowergate*, 31 Fed., 762, Benedict, *J.*; The *Benbrack*, 33 Fed., 687, Hughes *J.*; The *Concord*, 58 Fed., 913, Brown, *J.*; The *France*, 59 Fed., 479 (C. C. A.); *Riley* vs. *State Line S. S. Co.*, 29 La. Ann., 791; The *Titania*, 19 Fed., 101, Brown, *J.*; The *Lizzie*

Frank, 31 Fed., 477, Toulmin, *J.*; The *Olympia*, 22 U. S. App., 69, 79, 80; *Marsden on Collisions*, 3d Ed., 11, 24.)

In the *William Lindsay*, 5 Privy Council, 338, a vessel in port was moored to a buoy, the use of which was sanctioned by the port authorities for this purpose. The mooring buoy broke from some defects in it (p. 344), and the vessel was prevented by inevitable accident from dropping her anchor in time to avoid collision with another vessel which was properly moored. The question before the Court was whether the first vessel had contributed by negligence to the collision.

In the course of the judgment delivered by Sir Montague E. Smith, the Privy Council said (p. 343):

"These being the facts, the question arises whether there was any negligence in what was done or omitted to be done on board this vessel. Now, the master is bound to take all reasonable precautions to prevent his ship doing damage to others. It would be going too far to hold his owners to be responsible, because he may have omitted some possible precaution which the event suggests he might have resorted to. The true rule is that he must take all such precautions as a man of ordinary prudence and skill, exercising reasonable foresight, would use to avert danger in the circumstances in which he may happen to be placed. In this case the immediate cause of the mischief was the breaking of the band on the buoy, and it is said that the William Lindsay must be responsible for that breaking, because the master had chosen to moor her to it, and to treat it, without examination, as if it was his own mooring chain.

"Their lordships consider that that is not the correct view of the question. [The judgment then discussed the question whether the master was justified in availing himself of the use of the buoy, holding that he was, and continued.] That being the state of the case as regards these buoys, their lordships cannot think that there was anything like negligence on the part of the master of the *William Lindsay*, in mooring at one of them, *without examining for himself whither there might be latent defects in it. These questions of negligence must be decided by what a prudent and skilful seaman would do under the circumstances*, and by what he is able to do. It is obvious that no man, however prudent and however desirous to be on the safe side, would be able to examine these

buoys, so as to discover whether there were latent defects in them or not. He must, to a certain extent, trust to the sanction which has been given to them by the authorities of the port. No doubt that would not absolve him from all further precaution. He ought not implicitly to trust to that which he cannot to a certainty know is a safe buoy, and he ought to take reasonable precautions, in the event of its not holding him, to bring up, and secure himself from danger. Their lordships think, however, upon this first question, that there was no negligence on the part of the master in mooring to the buoy, and not discovering the defect, which undoubtedly led to the accident."

In The *Nederland* (*supra*), a passenger was injured by the breaking of a block while the ship's crew were in the act of setting the foretrysail. The shoulder of the swivel hook of the block attached to an eyebolt in the deck drew out from the iron strap surrounding the block. Butler, *J.* (p. 927), said:

"For accidents which could not be avoided by such care (resulting from *latent defects* in machinery or some other cause) he was not liable. He was not an insurer. The law is well stated in *Meyer* v. *Railroad Co.*, 14 P. F. Smith, 222. Here the accident occurred from the shoulder of the swivel drawing out of the block, so the witnesses testify and so the libelant says in his statement of facts. This could only occur by reason of some defect in the shoulder, and the shoulder being imbedded in wood and covered by the iron strap which was permanently affixed thereto, this defect could not be discovered."

In the *Flowergate* (*supra*), a grain trimmer, while engaged in rigging a tackle, preparatory to stowing a cargo of grain, was injured by the breaking of an eyebolt set in the deck, to which a block was attached, and in use for the purpose of moving the vessel along the dock. After the bolt broke, a latent defect was discovered below where it was countersunk in the deck. Benedict, *J.* (p. 763), said:

"The evidence is not sufficient to justify finding, as a fact, that the condition of the eyebolt when it was put to use at the time the plaintiff was injured, through its giving way, was such as to inform any one of the fact

that the bolt was already partly broken off. The eye was countersunk in the deck, and the old break was below the upper surface of the deck. This location rendered the defect, in truth, latent. The use of an eyebolt apparently sufficient, but in reality insufficient, solely because of a latent defect, entails no liability for damages caused by such defect."

In the *Benbrack* (*supra*), a stevedore was injured by the breaking of a hook used in raising cotton from the dock and loading it into the hold. The ship was exempted, on the ground that the hook gave way, on account of a latent defect. Hughes, *J.* (p. 688), said:

"The hook which was broken, as described, is brought into court, and it is plain from an inspection of it, that the cause of breakage was a flaw which involves more than half the fractured surface. The defect was a latent one, which was most probably such as would have eluded a close scrutiny, though we have no direct evidence on the subject. The hook had been purchased new in Liverpool; had been spliced to the tackle, during the voyage to Norfolk, to be ready for use, and had been actually used by the stevedores, in stowing this cargo, for five days before it broke and gave way, with the unfortunate result which has been described. The diligence required of the ship, in respect of this hook, was that ordinary diligence which a prudent man is bound to exercise, in conducting his own business. There is no evidence in this case tending to show that the master of the *Benbrack* was delinquent in this respect. * * * The makers and manufacturers of tools and mechanical implements, are responsible for their soundness, but *those who purchase them in good faith, and use them prudently and in ignorance of latent defects, cannot be held to guarantee all others, equally competent with themselves to judge of their quality, against accidents from them.*"

In the *Concord* (*supra*) a stevedore was injured by the giving way of a rung of a ladder, owing to a latent defect, where the rung entered the upright side. Brown, *J.* (p. 915) said:

"The case, therefore, seems to turn wholly on the question whether the ship is liable for the defect in the rung, which made it unfit for this occasional use to which it was liable. The ladder was apparently a firm and strong one. Examination, as the libelant's witnesses

stated, would not or could not disclose this defect of the rung. There is no evidence of any lack of diligence or care on the part of the owners or any of the officers of the ship in respect to these ladders. * * * The case is, therefore, really one of a latent defect not discoverable by any ordinary care or diligence. * * * The liability of the ship and owners to employees, as respects the sufficiency of equipment and appliances, is not that of warranty, as it is in regard to goods, but only for the exercise of due diligence."

In *Riley* vs. *State Line* (*supra*), a stevedore was hurt by the breaking of an iron wheel over which a fall rope passed in use for loading freight into the hold. Spencer, *J.*, who delivered the opinion, said:

"There is no proof that there was any apparent defect in this gin at the time the company furnished it to Cooper [the stevedore contractor] a few days only before, for unloading the vessel. On the contrary, at that time it is shown directly and by the probabilities of the case that it was apparently good, sound and new. It is very true that the gin was in point of fact either defective or insufficient, for had it not been so, it would not have broken; but *it was apparently good and sufficient in the opinion of men of experience and competency to judge.* It was sufficient and the company discharged its full obligation when it furnished to an experienced stevedore a tackle apparently good and sufficient and satisfactory."

In The *France* (*supra*), Wallace, *J.* (p. 480), said:

"The presumption of negligence is often raised by the circumstances of an accident, and it may be a legitimate presumption, that an appliance which gives out while it is being used for its proper purpose, in a *careful manner*, is defective or unfit. How far that presumption may go, in an action by an employee against an employer, to shift the burden of proof from the former to the latter, must depend upon the circumstances of a particular case. The mere fact that the appliance is shown to have been defective, is not enough to do so. *It must appear that the defect was an obvious one, or such as to be discoverable by the exercise of reasonable care.*"

In the *Bergenseren*, 36 Fed., 700, Brown, *J.*, decided that an empty rivet hole in a bulkhead between the fire-

room, and a water ballast tank, in which "wet" cargo was stowed—the location of the hole being down below the floor in the fire-room and thus out of the reach of ordinary inspection—was a latent defect.

(e.) It is obvious that in most of the foregoing cases, the defect which resulted in damage, would have been discoverable by the exercise of a high degree of diligence. The decisions hold, however, that a shipowner is not liable for such defects as are not discoverable by the eye, or by handling in the way of usual inspection. They are in line with *Christy* v. *Griggs*, 2 Campbell, 79, where the axletree of a coach snapped and the plaintiff was injured in falling. Lord Mansfield there held:

"That as the driver had been cleared of everything like negligence, the question for the jury would be as to the sufficiency of the coach. If the axletree was sound *as far as the human eye could discover*, the defendant was not liable."

To the same effect is the Scotch case of *Anderson* v. *Pyper*, 2 Mur., 261, 270, where it was held the following charge was proper:

"You are to say whether there was such appearance of defect *as the eye of an artificer, applied with reasonable attention, could discover*, and will take into consideration that the eye of an experienced person might discover defects imperceptible to others." This was consequent on a ruling, "The rule then is that if the carriage is sound as far as the human eye can discover, the proprietors are not liable."

In *Texas Pacific Ry.* v. *Barrett*, 161 U. S., 617, 618, this Court approved an instruction: "That a railway company is not required to adopt extraordinary tests for discovering defects in machinery which are not approved, practical and customary; but *fulfills its duty in this regard, if it adopts such tests as are ordinarily in use* by prudently conducted roads engaged in like business and surrounded by like circumstances."

Under the principle laid down in the foregoing cases, the appellant cannot contend that the defects in the

rivet testified by her own witness to have been latent (p. 45), were not in fact latent, unless she satisfies the Court, by competent evidence, that it was discoverable by the exercise of ordinary care (*Rapho* v. *Moore*, 68 Pa. St., 404, 408; 12 *Am. & Eng. Enc. Law*, 924, 925).

(**f**.) There is no proof that ordinary diligence in inspection called for a water test.

The suggestion of counsel that the defect in the rivet should not be considered to be latent, because, by filling the tank in Trinidad, the rivet might have been broken so as to make its defect patent, is not supported by any evidence that this was such an usual and customary precaution as should have been taken by a reasonably prudent and careful master.

The only evidence in the record of a usage to test tanks in this way is that which relates to tests made by builders. Though the libelant examined a number of witnesses who would have been experts on this subject, no attempt was made to prove by any of them the existence of such a usage or custom as applied to the facts of this case; and it is not believed that any such usage exists. Unless it is made to appear that such custom does exist, and that the captain neglected to conform to it, how can it be said that he was guilty of such want of care in inspection as would deprive the ship of the benefit of the exemption from latent defects?

(**g**.) It is submitted with deference that the Court ought not to lay down a rule that a particular kind of test should be adopted in regard to such a matter, without evidence of some usage or custom which has been disregarded.

The business of commerce is carried on largely in vessels which contain tanks. Certain rules no doubt exist with regard to periodic examinations of them, and for their survey and examination for purposes of safety and for classification (see the *Sandfield*, 79 Fed., 371, 375). Yet the record is absolutely silent on this whole subject.

It is known that the charter value of vessels, and the

insurance premiums of cargoes carried upon them, are regulated largely by the standing of vessels in the classification registers. Presumptively, the course of business between ships, shippers and underwriters, is adjusted and based upon the existing practices, and upon compliance with the rules adopted by experts who compose the committees of the classification societies. The fact, therefore, that no evidence has been adduced tending to show any usage or custom to apply a water test to a vessel which had been tested by hydrostatic pressure three months before, leads naturally to the inference that no such custom exists. Certainly, the record fails to show that any *does* exist, and, in the absence of such proof, there is no evidence upon which the Court can say that the Master did not exercise due diligence or care in examination of the bulkhead, after the hurricane, when he relied on the careful manual and visual examination of it by the engineer (pp. 43, 44, 45, 46), instead of applying a water test (see The *Warren Adams*, 74 Fed., 413, 416; The *William Lindsay*, L. R., 5 P. C., 338, 343.)

(**b.**) The evidence of the engineer, libelant's own witness, as to his examination of the bulkhead after the storm, is as follows:

(P. 43.) "Q. Did you examine the ship *after* the hurricane? A. I did, sir.

Q. *Where?* A. *Forepeak.*

Q. Where else? A. Engine room, stoke holes in the sides of the ship and tank bilges.

Q. Did you go down into the tank in the forepeak? A. Yes, sir.

(P. 44.) Q. What time of day? A. Between nine and ten o'clock in the morning.

Q. Did you make an examination of the interior of the tank? A. Not a practical examination. I made an examination just to satisfy myself, to have a look at the formation of the tank principally; it was the first time I had seen it; *I didn't go with the intention of examining whether there was any damage or not, but I made that my business when I was down there.*

Q. Did you examine to see whether there was any damage? A. Yes, sir.

Q. Did you look at the collision bulkhead? A. Yes, sir.

Q. Did you look at the knee tie? A. Yes, sir; *wherever there were rivets.*

Q. Was there any *coating or wash* on the forward side of the bulkhead? A. Yes, sir, *a coating of Portland cement.*

Q. *Was that over all the rivets?* A. *The rivets* and the bulkhead as well.

Q. Did you notice that any rivets were started on the inside? A. I couldn't tell that any had been started.

Q. *Had the cement been started?* A. *Not that I could see.*

Q. You say you examined wherever there were rivets on the inside of the tank? A. Yes, sir.

Q. How long were you down there? A. Upwards of an hour.

(P. 45.) Q. On what day was it that you went down into this tank first after this storm? A. On the morning of the 22d of August.

Q. The vessel was then at sea? A. Yes, sir.

Q. Did anybody go with you? A. No, sir.

Q. And it was your first visit to the interior of the tank? A. Yes, sir.

Q. How did you get down into it? A. Through a manhole door.

Q. Was there a ladder to go down into it? A. Yes, sir; three ladders.

Q. Inside? A. Inside.

Q. Permanent? A. Permanent ladders.

Q. *Did you carry lights with you?* A. *I did.*

Q. In what shape? A. In the shape of a *torch and a lantern.*

Q. And you say you found it all lined with Portland cement? A. Yes, sir.

Q. How thick was that lining? A. A heavy wash—washed with a solution of cement in paste form.

Q. What would you take that to mean in thickness, a heavy wash? A. It materially differs; depends upon the surface it is put on. *Put a coat of cement about one-sixteenth of an inch thick,* and *about the rivets would be thicker and clumsier.*

Q. You found nothing to indicate any starting of the cement? A. According to appearances.

(P. 46.) Q. Well, you saw it and you are telling us what you saw? A. Yes, sir.

Q. Was there cement on all the sides of the tank as well as the bulkhead? A. Yes, sir.

Q. And on the floor of it? A. There is no floor in it.

Q. It comes down to a flat surface on the bulkhead side,

doesn't it? A. No, sir: it is wedge shaped at the bottom of the ship.

Q. Was that portion of the tank which formed the bottom of the tank also covered with cement? A. Yes, sir; not only with a wash but with a body of cement.

Q. Was the top of it, which is the underside of the between decks there, also washed with cement? A. I am not sure of that.

Q. Could you, by means of these ladders, examine every portion of that interior? A. Yes, sir; and without the assistance of the ladders.

Q. Why, part of it is twenty feet high, isn't it? A. Yes; but you have got intermediate stringers that you could stand on.

Q. *This particular beam to which this angle iron is attached is inside of this tank?* A. *Yes, sir.*

Q. *At what height above the bottom of the tank is that beam?* A. *From the ship's bottom?*

Q. *Yes?* A. *Six feet or more.*

Q. *Did you look at that beam at all?* A. I *was on top of it.*

Q. Was that also covered with cement? A. Yes, sir.

Q. *Was the cement perfect there?* A. *Apparently.*

This was a fair, full and careful examination, calculated to detect the evidence of any undue straining of the bulkhead if it had then existed.

(**i.**) In the absence of evidence that other tests were usual, it will be presumed that the inspection made was reasonably sufficient. After such an inspection, the master was justified, as we submit, in assuming the bulkhead was still in the condition in which it left the builders' hands.

In the *Warren Adams*, 74 Fed., 413, where the insufficiency of an inspection of a vessel, prior to sailing, was in issue, the Court of Appeals of the Second Circuit said (p. 416):

"Besides the presumption afforded by the circumstances referred to [another adequate cause of damage], the examination of the shipwright, made just previous to the commencement of the voyage, is evidence which ought not to be ignored. Although he did not make an examination of all the seams in the centreboard trunk, it is reasonable to assume that those he did examine were in

such condition as to justify an experienced man in believing a more critical inspection was not necessary."

In the *Sandfield*, 79 Fed., 371, the District Court for the Southern District of New York considered the question of a shipowner's diligence in connection with a latent defect in a rivet in the ship's side. It was claimed that an examination in dock would have disclosed the defect. Brown, *J.* (p. 375), held:

"*There is not sufficient evidence* to warrant my finding that there was any lack of diligence in the inspection of the ship. The vessel was comparatively new, and built by first-class makers. She passed her first Lloyd's survey in February, 1895, when the whole bottom was inspected and the riveting found sound. No accident intervened. Diligent care of a ship does not require redocking more than once a year, in the absence of some known necessity for it, and at the time of this voyage a year had not expired since the last docking."

A similar matter was before Judge Brown in the case of the *Ailsa* and *Bourgogne* (76 Fed., 868, 876), where it was claimed *in argument* that a steamer outward bound from New York, seeing fog ahead, should have stopped at the Upper Quarantine, instead of attempting to proceed through the Narrows. Other vessels had gone through the Narrows in the fog. In disposing of the point, the Court said:

"This contention rests on the argument of counsel, and not upon any expert testimony, and it is too much to ask the Court to pronounce such a judgment, *in the absence of any expert testimony whatever*, and in opposition to the practical testimony of so many pilots acting under so high responsibilities."

So in the present case the Court is asked to declare, in opposition to the practical testimony of the three experts in charge of the navigation, that a certain kind of inspection test should have been adopted, though there is no evidence, expert or otherwise, that such a one was demanded by the circumstances. The Court may fairly decline this responsibility.

The counsel in the lower courts contended that the hammer test should have been tried on the rivets at this time. It is observed, however, that the present counsel concedes such a test was not called for (Supplementary Brief, p. 7), but only the water test. Nevertheless, the hammer test is a good test—one of the two employed by builders; and if the libelant could justly demand that one of them should be used, no reason is perceived why she should deny herself the luxury of the other.

(**j**.) The uncertainty that a water test in Trinidad would have disclosed anything is so great as to make it impossible to say, with any positiveness, that the failure to adopt it amounted to negligence.

It could not have afforded any information of latent defects, unless the rivet broke under the test.

If the tank, filled as it was at sea with the ship rolling, contained the water for a period of thirty-two hours, as Captain Legge claims (p. 27), and as the engineer's log states, it is reasonably certain that filling it in Trinidad would not have disclosed anything; while if it really broke in the filling of the tank, the opposite inference does not arise, because a far greater strain would necessarily be put upon the tank in filling it at sea with the ship rolling than would have been by filling it in port with the ship still. Hence, the fact that it broke in one case does not satisfy the mind that it would have broken in the other; and unless it is reasonably certain the test would have amounted to something, there could be no negligence in failing to use it.

(**k**.) The fair conclusion from the evidence seems to be that the defects in the rivet were hidden, and not discoverable by the ordinary or usual modes of inspection, which were all the master was bound to adopt, and hence were "latent," within the meaning of the exception. To press the duty of inspection, or of testing to the extent demanded by the appellant, would be, in effect, to substitute another kind of warranty, equally as stringent, in place of the warranty of seaworthiness, from which the shipowner

had sought and obtained relief by the exception of "latent defects."

IV.

The evidence discloses no sufficient reason for depriving the shipowner of the benefit of the exception of "latent defects." He had used diligence to make the ship seaworthy for the voyage, and she was seaworthy, in fact, when she sailed.

(**A.**) The burden of proof rests upon the libelant to defeat the operation of the exceptions.

In *York Co.* v. *Central Ry. Co.*, 3 Wall., 107, 112, Mr. Justice Field, delivering the opinion of this Court, said:

"Nor do we perceive any good reason, on principle, why parties should not be permitted to contract for a limited responsibility. The transaction concerns them only; it involves simply rights of property; and the public can have no interest in requiring the responsibility of insurance to accompany the service of transportation, in face of a special agreement for its relinquishment. By the special agreement the carrier becomes, with reference to the particular transaction, an ordinary bailee and private carrier for hire."

The decisions of this Court also hold that where such a contract for modified responsibility exists, then the loss falls within the exception. The burden of proof is shifted upon the shipper to defeat the operation of the (*Clark* v. *Barnwell*, 12 How., 272, 280; *The Victory and the Plymothian*, 168 U. S., 410, 423; *Transportation Co.* v. *Downer*, 11 Wall., 129; *Railroad Co.* v. *Reeves*, 10 Wall., 176, 189, 190).

The rule as to the burden of proof is the same, though a breach of the implied warranty of seaworthiness be alleged.

In the *Miranda*, L. R., 3 A & E., 561, 567, Sir Robert Phillimore ruled to this effect:

"This exception which is contained alike in all the bills of lading, though not always expressed in precisely the same words, is as follows: 'Accidents from machinery.' If I had to determine the case upon the point raised with reference to the alleged implied warranty of seaworthiness, I should rule that the *burden of proving the breach of such warranty rests with the defendants* [*cargo owners*], and that sufficient evidence as to the vessel's state, and the state of her machinery, has not been given to lead the Court to find that she was in an unseaworthy condition at the time the cargo was shipped. But I think the true question in the case is: Does not the exception 'accident from machinery' include the present case? I think that I must come to the conclusion that the accident in question finds its place among the excepted perils; it is, therefore, unnecessary for us to discuss the able argument which has been addressed to the Court, with respect to a warranty of seaworthiness being implied in the contract."

(**B.**) The shipowner exercised care and diligence in the construction of the vessel, only a few months before this voyage.

The Carib Prince was substantially a new vessel. She was built to order three months before this accident for Mr. George Christall, who operates a line of steamers, known as the *The Trinidad Line*, from New York to Trinidad (pp. 148, 7). She was an all steel steamer, of 1,304 tons net register, and of 2,500 tons dead weight capacity (p. 155). She was built by builders of the highest reputation in England, and at an expense considerably in excess of the usual cost of vessels of this class (p. 138). She was designed to be, and was, an exceptionally fine ship.

The utmost diligence was used by the owners to have her built well and by the builders to have this particular bulkhead properly erected and soundly riveted. The specifications for the vessel generally and for the riveting, bulkheads and water-testing were very stringent (pp. 157, 158), and were in excess of the requirement of Lloyds' Register (pp. 79-81). She was built in accordance

with these specifications (pp. 84, 79, 62, 184), by builders of good standing (pp. 13, 53), under the supervision of a Lloyds' surveyor, and the owners' architect and surveyor (pp. 74, 79, 68). The workmanship about the vessel was very good (p. 52).

The builders obtained and used the rivets most widely used in England (p. 57). Not every one, indeed, but enough of them were tested as to quality by bending them cold and flattening them cold (pp. 57, 58). The rivet holes were spaced according to Lloyds' rules for watertight work (p. 59), five and a quarter inches from centre to centre (p. 64). Wherever the holes in the plates were not perfectly fair, they were rimed out with a rimer (pp. 60, 66, 72, 77, 82), until they were fair, and then a larger rivet was inserted, one of seven-eighths of an inch instead of three-quarters of an inch diameter (p. 67). The "drift pin," which libelant's expert Quinn ignorantly supposed was used to stretch five-eighths inch steel plates so as to make untrue holes fair, was not used in any such way, nor for any such purpose. "It is put through to clean the hole when "necessary; it is put in oily waste and put through to see "that the thing is perfectly clear" (pp. 65, 60, 71, 81, 82).

The men who did the riveting in this tank were specially selected for their skill in watertight work, and some of them men of thirty years' experience (pp. 62, 70, 74, 77), and their work was supervised generally by one of the builders (p. 57); immediately by a foreman riveter of eighteen years' experience (pp. 62, 64), by the owners' inspecting surveyor who was at the ship about three hours a day (pp. 68, 70); by a Llyods' surveyor (p. 74), who was there nearly every day and saw much of the riveting done (p. 75); and by the owners' architect (p. 79), who visited the ship two or three times a week (p. 81), and saw the rivets after they were headed up.

Every rivet on the bulkhead was tested with a hammer both by the foreman riveter (p. 63) and by the owners' inspector (p. 69), and nearly every rivet was subjected to the like test by Lloyds' surveyor (p. 74). This test it is proved and not denied, would have detected any material crystalization of iron in a rivet from too much hammering; but on the tests, no such rivet was found (p. 69).

This evidence seems to be conclusive that the tank was sound and fit when completed, and that any defects in it were of such a minor character as not materially to impair its strength.

The bulkhead was further twice tested with the water test in presence of Lloyd's surveyor (pp. 74, 63, 58, 69, 79). The tank was filled and a hydrostatic pressure of $96\frac{3}{4}$ tons was put against the bulkhead. This was in excess of Lloyd's requirements (p. 79). The pressure thus exerted on the bulkhead was increased by the fact that the vessel was then lying on an incline of five eighths of an inch to the foot, or more than ten feet by the stern (p. 69). The bulkhead under these tests showed no sign of weakness or leaks (p. 80).

(**C**.) The interior face of the bulkhead was carefully inspected prior to the commencement of the voyage in question.

The evidence of the engineer as to the nature and extent of his examination is set out (*ante*, pp. 44, 45). It appears that he made as careful an examination of that side of it as was possible; that he saw no signs of strain, and that there was nothing to be seen there which indicated to a practiced eye that the bulkhead had suffered from strains or been weakened since it was tested in Sunderland three months before.

There was no proof tending to show that a different kind of examination or test should have been made (*ante*), or that if made, it would have shown anything further than was indicated by the inspection the engineer did make, namely, that the bulkhead seemed to be intact and sound.

(**D**.) *The steamer was, as a matter of fact, reasonably fit for the voyage.*

There was no charge of unseaworthiness in the libel as originally filed, nor has it been amended so as to embody such an allegation. Nevertheless, in argument, two grounds of unseaworthiness have been pressed in all the courts: (1), with regard to the limber boards, and (2), in respect of the rivet. Both of the courts below found there

was no unseaworthiness with respect to the limber boards, but both held the ship was unseaworthy in respect of the rivet, though such finding was accompanied by the conclusion that the steamer was relieved from liability by the exception of latent defects, which was directed to that form of unseaworthiness, and included it. Both of the lower Courts erred, as we submit, in holding the vessel was in any degree unseaworthy.

(1.) So far as concerns the limber boards there is little difficulty.

If they had been watertight, this would have been a remote, and not the proximate cause of the damage. Moreover, the tightness of the limbers could only have affected the *degree* of the damage. Libelant claims that there were four feet of water in the hold on the morning when the leak was discovered. Probably there were less than two feet (pp. 17, 110). But even that much must have overflowed the bilges, which were only from fifteen to eighteen inches deep, and have caused damage by swashing about.

It is unnecessary, however, to concede any fault with regard to the limbers. Libelant's arguments in respect of them proceed upon a misconception as to their purpose. They are not put over the bilges for the purpose of allowing water to drain from the upper part of the hold downward, but are to prevent that which may be in the bilges from causing damage by swashing *upward*. They form a water-course for such water as may enter the sides of the ship to flow aft to the pumps (Congdon, p. 136).

Moreover, the limber boards were *not* watertight. Captain Legge said (p. 10):

"The limber boards are laid there, but *not tight*."

(P. 15): "I don't know that there is any law that they should be tight; they are ordinary planks, and made to fit in; *they are not watertight;* water might get in, and water might not."

Q. I suppose you don't know whether some of the water went in or not, do you? A. No, I don't know."

The man who did know was the carpenter, Hopkins, whose business it was to attend to them. He testified (p. 109):

"I bored holes to let the water run *more freely* in the limbers * * *

Q. Did you take out the limber boards when you got to New York? A. Yes, sir. I do every voyage, to see if it is quite free for the water to run into.

Q. How tight were those limber boards? A. About middling, I should say; just a nice fit.

Q. Will water run through when they are down? A. Yes.

Q. Do you remember how tight you found them when you got to New York? A. Nothing to speak of. Just as usual."

He further says he cleared away the cargo from over the limber boards; and (p. 111).

"Q. And you *saw the water gurgling and going down?* A. *Yes, sir.* I thought it wasn't going *fast enough*, so I bored holes."

Libelant has no proof to contradict this evidence. It does not appear but that the bilges may have been substantially full of water before the carpenter bored the holes. Of course, when the sluice cock on the bulkhead was opened and the pumps started on the pipe line, the water that was in the bilges quickly drained out. The function of the holes was to permit a more rapid drainage of the accumulated water than that which would pass through the ordinary cracks of the limber boards. The limbers were built in the usual way, and no more tight than usual. The evidence shows nothing to the contrary. A single word in the captain's testimony on which the appellant relies (p. 13), that the water remained in the hold until the holes were bored, does not prove that it stayed there for the want of an outlet. He says distinctly (pp. 10, 15) that he did not know about that. What he probably meant was that some of the water remained in the hold until after the holes were bored. But that was because the pumps were only started a few moments before that time.

The cases cited by the appellant in this connection (*Sup-*

plemental Brief, p. 2) are not in point. They are all cases where water which had reached the bilges could not be got out because the drain holes through the ship's limbers *under the floor* were stopped with accumulations of various kinds, or because the pumps were defective.

Thewater, in this case, was confined in the hold because it was a watertight compartment, whose pumping outlets were kept closed for purposes of safety, except when the periodic soundings were taken. This is the usual custom. As soon as the water was discovered the pumps were started and the holes bored to allow the water to run out faster. It was going through the limber boards before the carpenter bored any holes (pp. 109, 111). If he had left it to flow out in the ordinary way this contention about the limber boards would never have been thought of.

(**2**.) The defects in the rivet were not such as to justify a finding of unseaworthiness.

(**a**.) The finding of the lower Courts was, in effect, that the implied warranty of seaworthiness called for a perfect vessel—not merely one reasonably fit for the purpose. The condition of unseaworthiness was assumed to follow from the mere fact that the rivet broke, and when broken disclosed a latent defect. The Court virtually held it was a case of *res ipsa loquitur*. But the doctrine of *Work* v. *Leathers*, 97 U. S., 379, does not apply when there has been another adequate cause for the breakdown. In the present case adequate cause *did* exist in the negligence which attended the filling of the tank (*ante*, pp. 21, 23).

(**b**.) The true test of seaworthiness is to inquire whether, if all the facts had been known while the vessel was at Trinidad, practical and experienced men would have agreed she was reasonably fit to make an ordinary voyage without damage to cargo.

There is no hard and fast rule by which seaworthiness can be determined. It must be determined with reference to the judgment of competent and prudent experts, versed in such matters and upon previous experience

(The *Titania*, 19 Fed., 101, 105, 106, 107, Brown, *J.*; Union Ins. Co. *v.* Smith, 124 U. S., 405, 425; *Eastern Transportation Line* v. *Hope*, 95 U. S., 298; Taney Rep., 126; *Adderley* v. *Am. Mut. Ins. Co.*; *Svendsen* v. *Starsberg*, 31 Fed., 86; *Janney* v. *Ins. Co.*, 10 Wheat., 411; *Rev. Stat. U. S.*, Secs. 4556–4561).

Seaworthiness in the hull of a vessel requires nothing more than reasonable fitness for the voyage. In *Steel* v. *State Line*, 3 App. Cas., 72, Lord Cairns said:

"By 'seaworthy' I do not desire to point to any technical meaning of the term, but to express that the ship should be in a condition to encounter whatever perils of the sea a ship of that kind, and loaded in that way, may be fairly expected to encounter in crossing the Atlantic."

In *Dupont de Nemours* v. *Vance* (19 How., 162, 167), Mr. Justice Curtis defined this obligation as follows:

"To constitute seaworthiness of the hull of a vessel, in respect to cargo, the hull must be so tight, staunch and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage, without damage to the cargo under deck. If the vessel during the voyage has leaked so much as to injure the cargo * * * one mode of testing seaworthiness is to ascertain what defects occasioning leakage were found in the vessel at the end of the voyage, and then to inquire which of those defects are attributable to perils of the seas encountered during the voyage, and which, if any, existed when it was begun; and if any of the latter be found, the remaining inquiry is whether they were such as to render the *vessel incompetent to resist the ordinary attacks of the sea* in the course of the particular voyage, without damage or loss of cargo."

In The *Titania*, 19 Fed., 101, 107, Brown, *J.*, stated the rule:

"The question of seaworthiness, therefore, as regards the implied warranty in favor of the insurer or the shipper of goods, is to be determined with reference to the customs and usages of the port or country from which the vessel sails, the existing state of knowledge and experience, and the judgment of prudent and competent persons, versed in such matters. If judged by this standard, the ship is found in all respects to have been reasonably

fit for the contemplated voyage, the warranty of seaworthiness is complied with, and no negligence is legally attributable to the ship or her owners. * * * It was long ago held (Amies *v.* Stevens, 1 Strange, 128) and is laid down in Abbott on Shipping (* p. 389) as elementary law, that 'if a vessel, reasonably fit for the voyage, be lost, by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril.' This principle applies equally to the stowage of the cargo."

In the *Rover*, 33 Fed., 515, 521, Brown, *J.*, in dealing with the question of latent defects, as affecting unseaworthiness, stated his conclusions as follows:

"Seaworthiness does not require perfection in machinery, more than in anything else. Perfection is unattainable. Only a reasonable fitness for the service designed is required (*Gibson* v. *Small*, 4 *H. L. Cas.*, 353; *Readhead* v. *Midland Ry. Co.*, *L. R.*, 2 *Q. B.*, 412, 440; *Burges* v. *Wickham*, 3 *Best. & S.*, 669, 692). In the case of *The Titania*, 19 *Fed. Rep.*, 101, 107, in reference to latent defects, it was said: '*The ship would be deemed seaworthy if, all the circumstances being known, she would still be deemed by competent persons, according to the existing knowledge and usage, seaworthy and reasonably fit for the voyage, although subsequent experience might recommend additional precautions.*' The rule as respects latent defects doubtless operates harshly upon shipowners. It cannot justly be pressed, as it seems to me, beyond the limitations above indicated; and *the first condition of the application of the rule must be proof, with a reasonable degree of certainty, of the fact that such defects did exist as, if known, would have been deemed to render the ship, as respects the defective subject matter, not reasonably fit for the service designed.*"

(**c**.) Applying these tests to the present case, the vessel was reasonably fit.

It is plain that the exterior hull was perfectly fit for the voyage. The only question relates to the rivet in the bulkhead. Suppose it had been known to a competent board of survey called in Trinidad to furnish a certificate of seaworthiness for the voyage, that one of the rivets in the tank had a slight cant, passed through holes that were just a shade out of line, and that its strength was im-

paired by the cystalline character of the iron, due to an excess of hammering in construction; is it to be presumed that they would have said the vessel was unseaworthy to make a voyage? Would they have said the mere inequality in the strength of a single rivet in this partition of the hull rendered the ship unseaworthy? They might have said, if they were in doubt, that water should not be carried in the peak tank with cargo in the adjoining hold. Proceeding in that way she would have been seaworthy. If they had furnished a certificate with that qualification, and the captain had afterward negligently filled the tank, would the Court say that the proximate cause of the damage was unseaworthiness, rather than the improper management of the tank? (Lord Esher, in *Hedley* v. *Pinkney* [1892], 1 Q. B., 56, 65).

It seems obvious that the ship would not have been unseaworthy if the rivet had been entirely out of the hole—provided that fact had been known. The vessel required no ballast in the peak tank on the voyage; its use was a mere whim of the captain—a thing he had never done before (pp. 22, 23).

Is the question as to the seaworthiness of the vessel to be answered in any different way because the captain was ignorant of the defect in the rivet? If as a reasonably prudent master he was justified in filling the tank at sea, and was justified in assuming that the rivet was without defect, knowing, as he did, that it had withstood the usual test for strength three months before, and that his engineer had examined it carefully after a storm on the preceding voyage and found no evidence of strain,—of course no question of unseaworthiness can arise. The case would then be one of damage from a latent defect which did not amount to unseaworthiness. But, if he was not justified in assuming the soundness of the bulkhead, its unsoundness was not the proximate cause of the damage, but rather his negligence in doing an act which *ex hypothesi* was improper; and such act, rather than the condition of the rivet, should be deemed the proximate cause of the loss. The case would then be one of neglect in the management of the ship, within the exception of the bill of lading (*Steel* v. *State Line*, 3 App. Cas., 72,

82, 90; *Hedley* v. *Pinkney* [1894], App. Cas., 222, 227, 228).

(**d.**) The alleged defect of untrue rivet holes is insufficient to justify a finding of unsoundness (The *Rover*, 33 Fed., 515, 521).

The evidence with regard to the holes has already been referred to (*ante*, p. 33). The irregularity complained of from a sixteenth to an eighth of an inch according to libelant's witness Quinn, was not unusual, was not such as would be rejected if the real conditions were known, but would be passed as good work (p. 115). The holes, however, were not as much as an eighth of an inch out of line. The testimony of the builders (p. 67) shows that where the holes were out of line they were rimed out until they became true, and were then stopped with a larger sized rivet. It is proved, and not disputed, that the rivets put through these holes originally were three-quarter inch rivets, and that the holes were three-quarter inch holes Mr. Congdon testifies that the holes could not be injured in any substantial degree, otherwise the rivet could not be put through (p. 56). The Court will also take notice that the men could not have put their fingers though in the way they did (p. 33), if the holes had been materially injured. The claimant's evidence shows that the way the rivet went through the holes was not of itself a source of weakness (p. 85); and the libellant's evidence shows that if it was weakened at all from being got through injured holes, it would be weakened through the centre, and would break off there (Quinn, p. 115), which this rivet did not do.

A similar point was before the District Court of New York, in the *Sandfield*, 79 Fed., 371, where Brown, *J.*, disposed of it as follows (p. 375):

"It is also likely enough that the cant given to the rivet by driving it through the overlapping holes which were not quite true, and the cant given to the clinch at both ends might diminish its endurance, by subjecting it to an unequal strain, and increasing the injurious effects of the vibration of the plates against it. If such was the fact, *any such mere inequality in the strength of the rivets does not amount to unseaworthiness*, or a violation of the

provision of the charter that the ship shall be 'tight, staunch and strong.'"

(**c**.) The degree in which the strength of the rivet was impaired by the excessive hammering which resulted in crystallization is purely speculative, but the fair weight of the evidence indicates that it was not so impaired as to make the rivet unsound.

We have the evidence of care in the selection of rivets, in the method of making the holes true, in the mode of riveting, and the fact that it withstood a test for soundness which exceeded Lloyds' requirements. These facts create a strong presumption of the seaworthiness of the rivet.

The seaworthiness of a ship regularly employed in commerce, is to be assumed as a fact, in the absence of countervailing facts (*Pickup* vs. *Ins. Co.*, 3 Q. B. D., 594; *Lunt* vs. *Ins. Co.*, 19 Blatchf., 151, 155; *The Rover*, 33 Fed., 515, 520; *The Warren Adams*, 74 Fed., 413, 415; 163 U. S., 79.

This presumption is not rebutted by the mere fact of breaking, nor by the crystalline appearance of the iron, when an adequate cause for the accident is found in the wrong way the tank was filled. In the circumstances, as two possible causes of damage exist, the libelant has the burden of showing that the real cause was one for which the ship is liable (The *Exe*, 14 U. S App., 626), and if that be left in doubt, she should not recover (*Searles* v. *M. R. Co.*, 101 N. N., 661; *The R. D. Bibber*, 8 U. S. App., 42, 47; *Muddle* v. *Stride*, 9 Car. & Payne, 380).

V.

The exception of latent defects in hull, machinery or their appurtenances, imports a modification of the implied warranty of seaworthiness. It covers the loss and exempts the ship.

It is assumed in this branch of the argument that the evidence of pains and care taken in the construction and

testing of the vessel a few months before this voyage (*vid. ante*, pp. 50, 51), and again in inspecting it after the storm of the previous voyage (*vid. ante*, pp. 44–46), were sufficient to justify the belief that the vessel was reasonably sound and fit for the service, and that, there is no evidence of any default on the shipowner's part that would prevent the operation of the exception. Both of the courts below have found to this effect (Rec., pp. 168, 212).

This exception is broad and specific enough to exempt the vessel from the damages, whether the defect in the rivet amounts to unseaworthiness or not. It is plain and unequivocal; and is the usual form of exception from latent defects that is found in the great majority of ocean and inland bills of lading (*vide* The *Sandfield*, 79 Fed., 371).

(**1**.) The appellant argues that the *Caledonia* (157 U. S., 124) is opposed to the contention that this exception may be viewed as a modification of the implied warranty of seaworthiness. It is desirable, therefore, to point out the essential points of difference between the two cases.

The grounds on which the decision of the Caledonia proceeded are: (*a*) that the exception of "steam, boilers and machinery, or defects therein," was not sufficiently definite and specific to be a modification of the implied warranty of seaworthiness; and (*b*) that as the exception formed part of a long enumeration of excepted causes of damage, all the rest of which related to matters subsequent to the beginning of the voyage, this one must be treated as equally limited in scope.

(**a**.) The exception of "*latent defects in hull, machinery or their appurtenances*," contained in this bill of lading, is more specific and definite than that of "defects in machinery" in the Caledonia case.

The exception now under consideration is an express modification of the implied warranty of seaworthiness, in the ordinary meaning of words. Though stipulations in

bills of lading are construed most strongly against the shipowner, nevertheless, this doctrine is not to be carried to the extent of substituting for the plain intention of the parties as fairly expressed in their contract, a fictitious presumption of their intention.

This was well put by Rigby, L. J., in *Baerselman* v. *Bailey*, 8 Asp. Mar. Cas., 4, 5: "Now if there be any ambiguity in the bill of lading, the document ought unquestionably to be construed against the shipowners. *But the true rule is first to see whether there be any ambiguity or not.*"

The aim of the Court must be, as stated by Lord Halsbury, in *Hamilton* vs. *Pandorf* (12 App. Cas., 518, 524), "*To give effect to all the words that the parties have used to express what this bargain is*"; or, as stated by Mr. Justice Nelson, in *Bulkeley* v. *Naumkeag Co.* (24 How., 386, 394): "*We must look to the substance and good sense of the transaction;* to the contract as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained in order to determine the scope and extent of them."

Looking to the "substance and good sense of the transaction," we find that the words employed were apt to relieve the shipowner from defects existing in the ship at the time the contract of carriage was entered into; that the implied warranty of seaworthiness, as a warranty against latent defects, is a "harsh" rule (Brown, *J*., in the *Rover*, 33 Fed., at p. 521), from which the shipowner would naturally desire to be relieved; and that the mutual intention to give such relief would be quite natural in view of the fact that Congress, by the Harter Act (*post*, Appendix), has given relief from the implied warranty of seaworthiness in a large class if not in all cases.

It is to be presumed that insurance policies have been or will be reformed to meet the risks put upon cargo by the Harter Act, and that insurance against latent defects is now readily obtainable. The cargo owner receives

a consideration for the exception in a diminished rate of freight (The *Wells City*, 61 Fed., 857, 859).

The four Judges who have already heard this case have concurred in holding that the exception of latent defects was an express modification of the implied warranty of seaworthiness. Benedict, *J.* (p. 168), held:

"The law of England as declared in the case of the Cargo *ex Laertes* (12 Prob. Div., 187), is to the effect that by the laws of England, such an exception as that contained in the bill of lading sued on, if it does not abrogate, at all events limits the warranty which the law would otherwise imply, that the ship was seaworthy at the beginning of the voyage, and exempts the vessel, if due diligence is exercised by the ship owner. Applying that law to this case, it follows from the fact that the weak condition of the iron rivet could not be discovered by the exercise of due diligence, that the ship cannot be held liable for the injury to the libelant's cargo because the danger arose from a latent defect in the rivet which gave way, within the exception of the bill of lading, under which the merchandise was carried."

Shipman, Circuit Judge, delivering the opinion of the Court of Appeals (p. 212), said:

"The bills of lading in these cases exclude losses arising from latent defects in the hull, and the question is, whether this language does not necessarily mean defects existing at the time of shipment, and therefore whether it does not clearly and even expressly exclude unseaworthiness arising from such defects. The only case in which the effect of an exemption of latent defects is discussed, is the *Laertes*, 12 Prob. Div., 187, but in that case, the language of the bill of lading was 'latent defects * * * even existing at time of shipment,' so that the intention of the parties to limit the implied warranty was manifest. In the cases at bar, it is urged that 'latent defects' must necessarily mean those existing at the time of shipment, and that any other construction is exceedingly strained. A defect in order to be latent must have been undiscoverable at the time of the shipment. It could not in its nature have been capable of discovery then, and have become capable of evading discovery subsequently. A construction which should say that 'latent defects'

meant only those which had become latent since the vessel left the wharf, and could not mean previously existing defects, savors of the distinctions of the school men; and if latent defects existing upon the voyage are exempted, those existing at the time of shipment are included, for they are the same. We concur with the experienced District Judge that the exception 'limits the warranty which the law would otherwise imply that the ship was seaworthy at the beginning of the voyage, and exempts the ship if due diligence is exercised by the owner.'"

We submit with deference, that the exception in the *Laertes* case, of "latent defects, even existing at time of shipment," expresses no further thought than the simple exception of "latent defects." The word "latent" speaks in the present tense. *Latens*, the present participle of the verb *lateo*, from which we derive the adjective *latent*, means "lying hidden." In the Standard Dictionary *latent* is defined as "Not visible or apparent; *with the implication of existence and potential activity;* concealed, hidden, dormant, as latent powers. * * * latent ambiguity." A *latent defect* is, necessarily, an existing, lurking, inherent defect. To say, as was said in the *Laertes*, that the ship was exempted from "latent defects, even existing at the time of shipment," is simply to say the same thing twice.

When the words "latent defect" are put in a bill of lading, they mean hidden defects existing at the time of shipment; for the bill of lading then attaches to the goods and its exceptions relate back to that time and exempt the ship from damage from all excepted causes happening thereafter (*Baerselman* v. *Bailey* [1895], 2 Q. B., 301).

Carver, Carriage by Sea, S. 58, states this rule as follows:

"When, however, a bill of lading has been given and taken, its provisions must be considered to relate back, and apply to what has been done in regard to the shipment before it was given. It is to be taken as the expression of the contract under which everything has been done. Thus, the exceptions of risks contained in it apply to the stowage of the goods, although that may have been

completed before the bill of lading was given (citing the *Duero*, L. R., 2 A. & E., 393; *Pyman* v. *Burt*, 1 Cab. & E., 207; *Norman* v. *Binnington*, 25 Q. B. D., 475, 478; *Nottebohm* v. *Richter*, 18 Q. B. D., 63)."

Other authorities holding to this effect are The *Carron Park*, 15 P. D., 203; *Scott* v. *Baltimore Steamboat Co.*, 19 Fed., 56; *Rubens* v. *Ludgate Hill S. S. Co.*, 20 N. Y. Supplement, 481; affirmed, 143 N. Y., 629; The *Southgate* [1893], Prob., 329; *Pollock on Bills of Lading*, 39.

The exception was obviously inserted for the purpose of exempting the ship from some liability to which, without such exception, she would be subject. Without such an exception the ship would be liable for unseaworthiness due to latent defects at the time of shipment. No other liability to which it may be presumed to apply can be suggested. It is evident from the language that the shipowner intended the exception to relieve him from that particular liability. Can the libelant reasonably pretend that she did not so understand the exception? She could not be heard to say she did not understand "latent defects" to include defects which existed at the time she received her contract, because she is presumed to understand the meaning of the words in their ordinary sense. It is impossible to conceive that two reasonable persons about to enter into a contract would insert a stipulation against latent defects, and mutually agree or understand, at the time, that it was only to apply to defects which might *become* latent in the future. Such a construction as Judge Shipman remarked, "savors of the distinctions of the schoolmen" (p. 213).

(**b**.) This exception, unlike that in the Caledonia, does not stand in a long enumeration of exceptions relating to matters subsequent to the beginning of the voyage, and hence does not fall within the second ground of the decision in that case.

The contract here (pp. 145, 146), was for delivery "in the like good order and will conditioned, at the aforesaid port of New York [subject to the enumerated exceptions

on page 146] unto J. W. Wuppermann, Esq." Between the words "at the aforesaid port of New York" and the words "unto J. W. Wuppermann," are two paragraphs of exceptions, some of which "relate to matters subsequent to the beginning of the voyage," but a large number of which relate to matters *prior to* breaking ground on the voyage. Amongst the latter are loss or damage from (1) fire on board in hulk or craft, or on shore (*Scott* v. *Balto. Stbt. Co.*, 19 Fed., 56); (2) latent defects in hull, tackle, boilers and machinery, or their appurtenances (The *Laertes*, 12 P. D., 187); (3) inaccurate description of goods shipped (The *Mississippi*, 76 Fed., 375); (4) insufficiency in packing or in strength of package (*Payne* v. *Ralli*, 74 Fed., 563); (5) inaccuracies of marks, numbers, designation or address on the packages. The question here is not one of putting a limitation on the general words, but of reading them in their ordinary sense (Lord Esher, M. R., in *Baerselman* v. *Bailey* [1895], 2 Q. B., 301, 304).

(**c**.) It is not denied in the *Caledonia* that the carrier may, by apt words, limit or modify the implied warranty of seaworthiness, or that such a clause introduced in the bill of lading relates back to and modifies the warranty as of the time of shipment.

The Court referred, with apparent approval, to the *Laertes* (*supra*), saying:

"The exceptions were held to limit the implied warranty of seaworthiness *in accordance with the expressed intention of the parties to that precise effect*, and for that reason only, take the case out of the general rule."

And, as if to save future cases, the Court added:

"*We are not dealing with the question of how far exceptions may be given effect in particular cases, but* whether by those under consideration claimants were exempted from liability for unseaworthiness, and we are clearly of opinion that they were not."

The real question here is: Does the exception amount to a precise expression of intention to limit the implied warranty? The claimant maintains that the words used taken

in their ordinary sense express precisely a mutual intention to relieve the shipowner from all damage that may be due to latent defects. If those defects amount to unseaworthiness, they are none the less an expressly excepted cause of damage; and hence it is to be presumed the parties must have meant it to modify the implied warranty if the defects should constitute unseaworthiness. The fact that a latent defect may constitute unseaworthiness does not make the exception ambiguous. Their primary intention as shown by their plain language was to except "latent defects", whatever they might amount to. A contrary holding, under a rule of construction against one of the parties, would impute to him an intent to remain liable for defects that were latent when he made his contract; *although in it he expressly stipulated then against any liability from such cause.*

There is no liability from which the Court ought to be more willing to permit a shipowner to obtain exemption than from that for latent defects (Brown, *J.*, in The *Rover*, 33 Fed., at p. 521). They exist wholly without his fault. The bare statement that a defect is latent shows that it has baffled and must baffle the exercise of due diligence and care. No liability for damages arising from latent defects could be established, except under the doctrine that the carrier is an insurer (The *Flowergate*, 31 Fed., 763; The *Concord*, 58 Fed., 913). This extraordinary liability has been taken away in some cases by statute as in Germany, where a latent defect is treated as *force majeur* (*Imperial Code of Commerce*, Sec. 607).

(2) In the accepted commercial understanding of the exemption of "latent defects", it amounts to a modification of the implied warranty of seaworthiness (*Pollock on Bills of Lading*, 39). The Court should, if possible, adopt the universal commercial construction.

The wording of the exception found in this bill of lading, of "*latent defects in hull, tackle, boilers and machinery, or their appurtenances,*" has been adopted and retained after prolonged discussion and deliberation in commercial bodies in which shippers, shipowners and underwriters on both ships and cargoes have taken part.

Discussion of the form of this and the negligence clause has extended over a period of more than thirty years. The history of the discussion, and the results reached, is given in *Wendt's Papers on Maritime Legislation* (3rd Ed.), Chapter II., entitled "*The International Law of Affreightment in Connection with the Attempts to Agree upon Uniformity in the Wording of Bills of Lading*" (pp. 295–513).

(**a**.) It appears that the agreement reached in regard to general average by the York Congress of 1864, led to attempts to come to some similar arrangement upon the subject of freight and contracts of affreightment.

The first step in this direction was a *projet* in regard to *freight* drawn up by two of the Belgian delegates to the International General Average Congresses (*Wendt*, p. 295). It was approved by an Executive Council of the National Association for the Promotion of Social Science, which met in Sheffield, October 5, 1865, under the presidency of Sir Robert I. Phillimore (*Wendt*, pp. 298, 308).

Changes in the terms and conditions of contracts of affreightment, found necessary by the different commercial conditions which followed the introduction of iron and steel vessels as instruments of commerce, were first considered in public deliberations after the opening of the Suez Canal, in July, 1871, at a meeting of merchants and others engaged in trade to the East, who agreed upon an Eastern Trade Bill of Lading (*Wendt*, p. 309). The form of this document is not preserved (*Wendt*, p. 345). The deliberations of this committee were not, however, of an international character.

(**b**.) Dr. Wendt observes (p. 309) that it was left to the *Association for the Reform and Codification of the Law of Nations* to resume, in 1879, the consideration of the international law of affreightment at the stage where it had been left by the Sheffield Congress in 1865. Three years were spent in correspondence and preparations for a meeting to deal with the subject, and in drafting the model bill of lading. The conference met at the Town Hall, in Liverpool, August 8, 1882, to debate the terms of the proposed document (Wendt., p. 356).

The committee which drafted the form of the bill of lading submitted to the Association for its action was composed of representatives of the following commercial interests: (1) The Ship Owners' Association (two members); (2) the Steamship Owners' Association (two members); (3) the Chamber of Commerce (two members); (4) the American Chamber of Commerce (two members); (5) the East India and China Section of the Chamber of Commerce—English (two members); (6) the Iron and General Metal Trade Section of the same chamber (two members); (7) Cotton Section of the same (two members); (8) the Underwriters' Association (two members); (9) the Liverpool Law Society (two members), who were asked to take part in order to advise the committee on points of law and to assist in the framing of clauses. There were in addition seven of the Central Association members on the committee, who took part *ex-officio* in the deliberations of the committee (Wendt, p. 359).

It will be observed that the cargo and underwriting interests had, on this committee, *fourteen* members; that the shipowners and steamship owners had but *four* members; that there were two members from the Law Society and seven members from the General Committee. Even if it be assumed that the two lawyers and the seven members of the General Committee all took part in the interest of the shipowners (a most improbable assumption), the committee which drafted the bill of lading submitted to the Conference would be composed of *fourteen* members representing cargo interests against *thirteen* representing shipowners' interests. Such a committee, presumably, would deal fairly with cargo interests, however strict they might be in excluding provisions favorable to the shipowners.

The draft bill of lading (*Wendt*, pp. 363, 366) was considered carefully by the full body of the Association, clause by clause (*Wendt*, pp. 366-379). The result of their deliberations was the adoption of the form of document, since known as the "*Liverpool Bill of Lading*, 1882" (*Wendt*, pp. 379-382; *Carver, Carriage by Sea*, 2d Ed., p. 761).

In the draft bill presented to this Conference the clause in regard to latent defects was expressed as follows (*Wendt*, p. 364):

"Ship not answerable for losses through explosion, "bursting of boilers, breakage of shafts, *or any latent de-* "*fect in the machinery or hull* not resulting from want of "due diligence by the owners of the ship, or any of them, "or by the ship's husband or manager."

This clause was, without doubt, introduced as a limitation upon the shipowners' obligations as defined in *Lyon* v. *Mells*, 5 East., 428; *Kopitoff* v. *Wilson*, 1 Q. B. D., 377, and *Steel* v. *State Line*, 3 App. Cas., 72, to the effect that under his implied warranty of seaworthiness, he is deemed to warrant not merely that he will do his best to make the ship reasonably fit, but that she *shall be* reasonably fit for the voyage (The *Gelfruin*, 10 Prob. Div., 103, 108).

It is noteworthy that, although the discussion upon this document was very full, and participated in by a large number of European delegates, not a word is reported to have been said against the justice of this particular exemption. It was adopted by the Conference in precisely the form in which it was submitted (*Wendt*, p. 380).

(**c**.) In 1883 the *New York Produce Exchange*, a body composed of merchants, shipowners and agents, average adjusters and bankers, appointed a committee to draft a bill of lading for steamships, to be used as a basis of outward bound contracts (*Wendt*, pp. 382, 395). The committee was composed of three merchants, two shipowners, a banker and an average adjuster (*Wendt*, p. 395). They agreed on a form based chiefly on that adopted in Liverpool at the conference of the *Association for the Reform and Codification of the Law of Nations* in 1882 (*Wendt*, 382). In their report they proposed to retain the clause in which occurs the exception for latent defects, but phrased as follows:

"Ship not answerable for * * * losses through ex- "plosion, bursting of boilers, breakage of shafts, or any "*latent defect* in hull or machinery, not resulting in either "case from want of due diligence by the owners of the

" ship, or any of them, or by the ship's husband or man-
" ager " (*Wendt*, p. 387, 395–397).

This bill, with slight modifications, was adopted by the Exchange October 24, 1884 (*Wendt*, p. 405). The clause in question was slightly modified so as to read as follows (*Idem*, p. 406):

" It is also mutually agreed that the carrier shall not be
" liable for loss or damage occasioned by * * * any
" latent defect in hull, machinery or appurtenances," the phrase " not resulting from due diligence, &c.," being omitted.

(**d.**) Meantime in England, in 1883, the *Australian and New Zealand Underwriters' Association*, consisting of eighteen separate insurance companies, and the *Combined London Marine Underwriters*, consisting of thirteen companies, sent protests to the secretary of the Association for the Reform and Codification of the Law of Nations against the form of the bill of lading adopted in 1882 (*Wendt*, pp. 398 to 402). These protests, however, were aimed exclusively at the negligence clause, and *no objection was made in either protest to the exemption against latent defects.*

(**e.**) The *New York Chamber of Commerce*, in a report of March 6, 1884, opposed the principle of the Liverpool and New York Produce Exchange bills of lading. They prepared an act to be introduced in Congress, making it unlawful to insert in contracts of carriage certain of the provisions which had been agreed upon in the Liverpool bill of lading, and were about to be adopted by the Produce Exchange; and this act seems to have passed the House of Representatives (*Wendt*, pp. 402, 405). Although by this proposed act it was made unlawful to insert any negligence exemption in a bill of lading, the effect of the third section was to permit the insertion of an exemption against latent defects. Section 3 (*Wendt*, p. 403) provided that:

" It shall not be lawful for any such vessel, her owners,
" master, agent, or manager to insert in any bill of lading
" any clause, covenant or agreement whereby the obliga-

" tions of the owners of said vessel to properly equip, man, " provision and outfit such vessel, *and in every way and* " *manner within their, his or her power to render said* " *vessel seaworthy* and capable of performing her intended " voyage, shall in any wise be lessened, weakened or " avoided."

This did not exclude an exception of latent defects.

(f.) As a result of the agitation in England by merchants and underwriters against the Liverpool form, the next meeting of the *Association for the Reform and Codification of the Law of Nations*, in Hamburg, August, 1885 (*Wendt*, p. 430), rescinded its action taken at the meeting at Liverpool, in 1882, and adopted a short form of bill of lading without exceptions; but provided that it should be subject to all the conditions of the Hamburg Rules of affreightment, which were also drawn up by the Association at the same time (*Wendt*, p. 472). These were based chiefly on a series of rules proposed by the Hamburg Chamber of Commerce (*Wendt*, pp. 435, 438).

The rule as to latent defects proposed by the Hamburg Chamber of Commerce (*Rule* 2; *Wendt*, p. 436), read as follows:

" Owners to be exempt from any latent defect in hull or " machinery (*not resulting in either case from unseaworth-* " *iness*, or from any want of due diligence by the owner of " the ship or by the ship's husband or manager)."

This rule, as modified by the society before adoption (*Rule* 2; *Wendt*, 472), read:

" The shipowner shall not be responsible for loss or " damages arising from *vis major*, public enemies, civil " commotions, pirates, robbers, fire, explosion, bursting " of boilers, breakage of shafts or screws, nor any *latent* " *defect* in hull or machinery not resulting from want of " due diligence by the owner, husband, or manager of the " ship."

The words, "*not resulting from unseaworthiness*" in the proposed rule was *omitted* from the rule as adopted.

(**g**.) The thread of this discussion was next resumed by a congress assembled at Antwerp in September and October, 1885, under order of the Belgian Government (*Wendt*, p. 476). This congress, amongst its conclusions, stated:

"It is, however, lawful for the parties to vary this "[shipowners'] responsibility by special stipulations, with "the following exceptions: Owners of the ships should "be prohibited from relieving themselves, in advance, of "their responsibility by inserting a clause in the contract "of affreightment, the bill of lading, or any other agree- "ment (a) for any *acts of their captains or officers* tend- "ing to compromise the seaworthiness of the ships."

It is plain that this was not designed to prevent an exception from latent defects in the hull or machinery of the vessel; these would not, in the nature of things, result from any act of the captain or officers.

(**h**.) At a meeting of the *Baltic Exchange*, London, July 25, 1885, a bill of lading was adopted for use in trade with the Black Sea, Mediterranean and Baltic (*Wendt*, pp. 428, 429). This document contained the following clause:

"Strandings, collisions, &c., are also excepted even when "occasioned by negligence, * * * but nothing herein "contained shall exempt the shipowner from liability to "pay for damage to cargo occasioned by bad stowage, by "improper or insufficient dunnage or ventilation, or by im- "proper opening of valves, sluices and ports, or by causes "other than those above excepted, and all the above excep- "tions are conditional on the vessel being seaworthy "when she sails on the voyage, *but any latent defects "in the machinery shall not be considered unseaworthi- "ness* provided the same do not result from want of due "diligence of the owners, or any of them, or by the ship's "husband or manager."

In the form of the charter party for that trade the exception was extended so as to include latent defects in *hull* or machinery, or their appurtenances. These documents were before *Brown, J.*, in the case of the *Sanfield*, 79 Fed., 371, where he absolved a vessel from damage claimed to have been due to a latent defect.

(**i**.) In December, 1885, a subcommittee of the *London Chamber of Commerce* (*Wendt*, p. 478) drafted an act, designed to be introduced in Parliament, which was entitled, "*An Act to regulate and define the duties and liabilities of shipowners*" (*Wendt*, pp. 478-485). Section 6 of this proposed act provided:

"Any provision or exception in the bill of lading or in "the agreement purporting to relieve or exonerate in any "way any shipowner from any duty to properly equip, "man, provision and fit out any ship, and to render it "seaworthy, or for any implied warranty of seaworthi-"ness in a contract of affreightment shall be null and "void;"

But it contained a proviso that

"*No shipowner shall be liable for injury, damage, or "loss as aforesaid caused by or arising from any latent "defects in the hull, machinery*, tackle, equipment, or "outfit of a ship, which could not have been discovered "by reasonable care or skill *on the part of the shipowner, "master, crew, servant or agent.*"

That this committee, representing cargo interests chiefly, voluntarily inserted the proviso concerning latent defects, is a concession of the reasonableness of the exemption. Their report was adopted and confirmed by the general committee of the London Chamber of Commerce, April 5, 1886, but was not followed by any action of that body (*Wendt*, p. 486).

(**j**.) In the month of May, 1886, the *Chambers of Commerce of Hamburg and Bremen*, as well as the associations of shipowners at those ports, agreed upon the adoption of a uniform bill of lading for steamships, and issued a statement respecting its introduction (*Wendt*, pp. 487, 490). That document contained an exception of "any latent defect in hull or machinery, not caused by unseaworthiness or want of due diligence by the owner or 'ship's husband.'"

(**k**.) Action was next taken on this subject in England at the meeting of the *Association for the Reform and Codification of the Law of Nations*, which met in London

July 25, 1887, under the presidency of Sir Charles Parker Butt, one of the Judges of the Admiralty Division (*Wendt.*, p. 493). The form of bills of lading was there fully discussed again by the representatives of different nations, including our own. Dr. Sieveking, president of the Hanseatic Court of Appeal at Hamburg, presiding during most of the discussion (*Wendt*, p. 496). The result of the deliberations was that the association receded from its action taken in Hamburg in 1885, passing the motion of Mr. Gray Hill, of Liverpool, to return to the bill of lading adopted by its conference in Liverpool in 1882, which was again accepted as a reasonable and fair document (*Wendt*, pp. 497, 506).

(**1.**) It is not reasonably to be doubted that, in all of these cases, the committees of shipowners, merchants and underwriters, who drew up and agreed upon the foregoing forms of bills of lading, understood and intended that the exception of latent defects should exclude all liability on the part of the shipowner for latent defects which existed at the time of shipment. The purpose of the exception is so universally known and recognized, that any other interpretation of it would be a departure from the usual commercial construction.

(**3.**) It is plain that the second section of the Harter Act (*Appendix*, p. 87), does not prohibit the introduction of an exception of latent defects in the hull existing at the time of shipment.

That section merely prohibits the introduction of any clause whereby the obligation of the owner *to exercise due diligence to make the ship seaworthy* shall be lessened, weakened or avoided. The third section provides that if the owner shall exercise due diligence to make the ship seaworthy and have her properly manned, outfitted and equipped, he shall not be liable for faults or errors in navigation, or in the management of the vessel, or for damages arising from dangers of the seas, &c. It was the obvious purpose of the second section merely to prohibit the introduction in bills of lading of clauses incompatible with the exercise of that measure of diligence in providing a seaworthy ship which is called for by the

third section. An exception from liability for latent defects existing at the time of shipment, by its terms covers only such defects as are not discoverable by the exercise of due diligence, and hence is not obnoxious to the second section, even though that section be deemed to apply to contracts made abroad and valid where made, a matter not necessary to be determined in this case.

(4.) The appellant is not in privity with the express warranty of seaworthiness in the charty-party between James Knott, owner, and George Christall, charterer of the vessel.

A year prior to this voyage the claimant had chartered the *Carib Prince* to George Christall, of the Trinidad Direct Line Steamship Company, for the period of four years (p. 148). The steamer was engaged under that charter at the time of the accident. It vested the entire possession and control in Christall, who operated her with his own servants and at his own expense. It was a demise charter (*Scrutton on Charter Parties*, pp. 1-3; *Baumvoll* v. *Gilchrist*, 1892, 1 Q. B. D., 258; *Baumvoll* v. *Furness*, 1893, App. Cases, 8; *Meiklereid* v. *West*, 1 Q. B. D., 428; *U. S.* v. *Shea*, 152 U. S., 178; *Freed* v. *U. S.*, 11 Wall., 591; *Hooe* v. *Groverman*, 1 Cranch, 214; *Marcardier* v. *Insurance Co.*, 8 Cranch, 39; *Bramble* v. *Culmer*, 78 Fed. Rep. 497).

Notwithstanding such a demise of the vessel, it has been held that she is liable *in rem* for the breach of a contract of carriage made for her by the charterer (*Schr. Freeman* vs. *Buckingham*, 18 How., 182).

Libelant's bill of lading was issued by Christall (fol. 434). She declared on this contract in her libel (fol. 5), apparently on the theory that it bound the ship *in rem*, though signed by the charterer (The *Centurion*, 57 Fed., 412, 416). No reference was made in her pleading to an express warranty of seaworthiness contained in a charter between other persons. Any such allegation would have been impertinent. Her rights, and the steamer's obligations to her, are to be determined from the bill of lading (*Iron Mountain Ry* v. *Knight*, 122 U. S., 79, 92; *N. J. St. Nav. Co.* v. *Merchants' Bank*, 6 Howard, 344).

She is not in privity with the charter or any of its stipulations; nor is she in position to claim any greater rights as against the steamer than she had as against the charterer with whom she contracted, on the terms, conditions and exceptions stated in the bill of lading.

It is alleged that the merchandise in question was libelant's property at the time of shipment (fol. 5). If this be true, the shipper was her agent for the purpose of shipment and to make the contract. It is presumed he had authority to make it in the form adopted (*Zimmer* v. *N. J. Central Ry.*, 137 N. Y., 460, 463; *Jennings* v. *Grand Trunk Ry.*, 127 N. Y., 438, 446); but no question can arise on this point, since the libelant adopted the contract and declared on it in her libel (fol. 5).

Moreover, this charter-party is not before the Court except for a qualified purpose. The libelant had examined as witnesses Ernest C. Legge, master, and Edward Keeys, engineer, and certain entries of the engineer's log book had been put in evidence by the libelant (p. 43). The claimant thereupon to show that these entries were not binding on them proved that the officers and engineers of the ship were not servants of the shipowner (p. 86), and offered in evidence the charter-party, "for the purpose of showing that it is only a charter of the bare ship and that all of the members of the crew and officers are servants of the charterer, not of the shipowner" (fol. 257). It was not introduced by the claimant for the purpose of varying, in any way, the contract between the libelant and the ship, as agreed in the terms of the bill of lading (p. 145). The bill of lading made no reference whatever to the charter-party.

VI.

The Bearing of the Harter Act.

The consideration of the statute of February 13, 1893, familiarly known as the "Harter Act" (2 Supp. R. S., p. 81; *Appendix*, pp. 87–89), is more especially involved in the case of the *Silvia*, No. 79, which follows this

case on the calendar. It will be unnecessary to resort to it here unless the Court holds that the loss is not within any of the exceptions contained in the bill of lading. In that contingency the claimant would desire to invoke the protection afforded by the third section of the statute, assuming that, like the former acts relating to navigation, it is applicable to foreign vessels (The *Etona*, 64 Fed., 880, 882; 38 U. S. App., 50; The *Silvia*, 35 U S. App., 395; The *Strathairley*, 124 U. S., 555; The *Scotland*, 105 U. S., 24, 30; The *State of Virginia*, 60 Fed., 1018; *Thomassen* v. *Whitwell*, 12 Fed., 891; *In re Leonard*, 14 Fed., 53; *Levinson* v. *Oceanic Steam Nav. Co.*, 15 Fed. Cas., 442). The third section provides:

"That if the owner of any vessel, transporting merchandise or property to or from any port in the United States of America, shall exercise due diligence to make said vessel in all respects seaworthy and properly manned, equipped and supplied, neither the vessel, her owner or owners, agents or charterers, shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel," &c.

(1.) The owner of the vessel exercised due diligence to make her in all respects seaworthy and properly equipped and supplied, within the meaning of the statute.

The evidence of diligence and care used in the construction and testing of the vessel has been referred to in another connection (*ante*, p. 50–52). It shows, in effect, that no pains nor expense was spared in providing a seaworthy vessel, and that the owner was justified, as both the lower Courts have found, in believing her to be seaworthy. She was a more expensive vessel than others of her class; she was constructed to possess greater strength than was called for by the requirements of Lloyds' Rules, and the bulkhead in question withstood tests in excess of those so required. The general competency of her officers appears. It is not questioned.

It is not shown that any usual or customary precaution for preserving and maintaining the sound condition of the vessel was neglected. The presumption of fact would be that she was still fit (*Pickup* v. *Ins. Co.*, 3 *Q.*

B. D., 594; *Lunt* v. *Ins. Co.*, 19 *Blatchf.*, 151, 155; The *Warren Adams*, 74 Fed., 413, 415; The *Rover*, 33 Fed., 515, 520).

The only suggestion of any default is found in the argument of counsel that the tank should have been filled with water in Trinidad. That suggestion has been dealt with in another connection (*ante*, pp. 43–47), where we have endeavored to show (*a*) that there was no proved usage to adopt such precaution; (*b*) that it is to be presumed, in the absence of other proof, that the examination of the bulkhead, made by the engineer in Trinidad was of the usual character; (*c*) that such examination was carefully made, and would probably have discovered the fact if the bulkhead had really been strained at that time (The *Warren Adams*, 74 Fed., 413, 416) and (*d*) that the uncertainty as to whether the water test would have disclosed anything is such that the failure to adopt it cannot constitute a want of due care or diligence.

The conclusion from the evidence is not only that the owner used due diligence by providing a proper ship, with all needful appliances, and competent officers and men to manage them (The *Silvia*, 64 Fed., 607), but also that those officers and men used that degree of diligence which the statute calls "due," in their effort to have the ship actually seaworthy for the voyage. Possibly the *highest* diligence would have insured seaworthiness; but even that is not certain. The statute, however, calls for ordinary diligence only; not for the highest diligence.

Due diligence means nothing more than that degree of carefulness and attentiveness which men in general exert in respect to their own affairs; that common prudence which men of business and heads of families usually exhibit in conducting that which interests them. The diligence actually exercised was of this grade.

(**2.**) The damage was within the exemption of "faults or errors in navigation *or* in the *management*" of the vessel.

(**a.**) It has been argued (*ante*, p. 16 *et seq.*) that the proximate cause of the damage was the *negligent filling*

of the tank at sea. If the Court adopts that conclusion, it seems plain that the careless act, if not strictly of navigation, was a fault in the *management* of the vessel (The *Silvia*, 64 Fed., 607; 35 U. S. App , 395; The *Sandfield*, 79 Fed., 371; The *Mexican Prince*, 82 Fed. 484; *Botany Worsted Mills* v. *Knott*, 76 Fed., 582, 584; The *Colima*, 82 Fed., 665, 680; The *Glenochil* [1896], Prob , 10, 15, 16, 18, 19; *Carmichael* v. *Liverpool*, &c., 19 Q. B. D., 242; *Good* v. *London*, &c., L. R., 6 C. P., 563; The *Warkworth*, 9 P. D., 20; 9 P. D., 145; *Hedley* v. *Pinkney & Sons Co.* [1894], App. Cas., 222).

If it be considered that the damage was due to a combination of two causes, namely, a latent defect in the rivet existing at the time of shipment, and the negligent filling of the tank, the ship is nevertheless exempted. The existence of the latent defect was not owing to any want of due diligence by the owner, and hence was not a matter which imposes any liability upon him where the *immediate* cause of the loss is a fault in navigation or management.

Under the cases above cited, and on the uncontradicted evidence of the only witnesses examined on that subject (Congdon, pp. 133, 135; Martin, p. 91; Saunders, p. 86), filling the tank at the time and in the way it was filled was a fault in management. It would be none the less a fault in management though the Court should be of opinion that the water test should have been applied in Trinidad. The argument that such a test was called for is predicated on the assumption that the master, as a reasonably prudent man, should have thought of the liability of injury to the bulkhead in the recent previous storm. The same reasoning leads to the conclusion that, having neglected to make such a test, he should not have used the tank on the voyage, and that hence his act in using it then constituted a mismanagement, which, rather than the failure to test it with water previously, was the proximate cause of the loss. There was no necessity of his using it; he ought to have used the tank under the floor, which was empty, instead of the peak tank. This is almost a matter of common

knowledge in regard to navigation, and is conceded in the supplemental brief for the appellant (p 4).

There was no water in the peak tank when the ship left Trinidad, and, so far as appears from the evidence, there was no thought then of filling it during the voyage. It had not been filled during any previous voyage (pp. 22, 23). The ship was perfectly seaworthy to start in the condition in which she was, without water in the tank, and hence the rule stated in *Arnauld on Insurance*, Vol. 2, p. 640, may be invoked:

"It is enough to satisfy this warranty" (of unseaworthiness) "if the ship be originally seaworthy for the voyage insured when she sails on it. There is no implied warranty that the ship shall continue seaworthy in the course of it. 'Every ship,' says Lord Mansfield, 'must be seaworthy when she first sails on the voyage insured, but she need not continue so throughout the voyage.'"

It was an act of management of the ship during the voyage that made the latent defect a source of peril to the cargo. If the tank should not have been managed in that way without having applied a water test to it before sailing, the act became one of mismanagement, or a fault in the management, and is thus within the protection of the statute.

Plainly it would have been a fault in management to have filled the tank, if the master had known that one of the rivets was out and that water would spurt in on the cargo through a rivet hole. If, though he knew of no defect in it, yet in view of the storm of the previous voyage, he was not justified in treating the tank as sound without having tested it with water before sailing, his act in putting the sea against it was of the same quality.

(**b.**) If the failure to apply the water test before sailing was a fault, it was a fault of the master in the management of the ship, and not a want of due diligence in the *owner* (*Massey* v. *Morris* [1894], 2 Q. B., 412; The *Warkworth*, 9 P. D., 20; do., 145).

It is not strictly material whether the fault in management has or has not left the ship unseaworthy, since by

the statute a warranty of due diligence by the owner has been substituted for the former absolute warranty of seaworthiness. This has been decided in a number of cases: thus, in the *Colima*, 82 Fed., 665, 678, Brown, *J.*, held:

"The context and the pre-existing law indicate that the intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of [due] diligence to make the ship seaworthy."

(**c.**) The diligence referred to in the statute is the owner's *personal* diligence, not that of servants.

The third section of the act was plainly a provision for the limitation of the pre-existing liability of shipowners. (The *Delaware*, 161 U. S., 459, 471; the *Silvia*, 64 Fed., 607, 608, Brown, *J.*; 35 U. S. App., 395, Wallace, *J.*; the *Colima*, 82 Fed., 665, 678, Brown, *J.*). It should therefore be construed as *in pari materia* with the prior limitation statutes (R. S., Secs. 4282-3-4-5, 282-3-4-5; Act of June 26, 1884, *In re Meyer*, 74 Fed., 381). By those statutes the liability of the owner was limited, in the cases specified, where the loss had not occurred from his "design or neglect" or "privity or knowledge." The decisions under them hold, that the design, neglect, knowledge or privity that excludes their operation must be *actual*, and not merely constructive or imputed; that is, actual through the owner's knowledge, or authorization, or immediate control of the wrongful acts, or conditions, or through some kind of personal participation in them (*Walker* v. *Transportation Company*, 3 Wall, 150, 153; *Craig* v. *Insurance Company*, 141 U. S., 638, 646, 647; *Hill Manufacturing Company* v. *Providence & N. Y. S. S. Co.*, 113 Mass., 495, 499, 500; s. c., 109 U. S., 578; *Quinlan* v. *Pew*, 56 Fed., 111, 113, Nelson, *J.*; opinion of Court of Appeals, *do.*, pp. 116, 117; the *Republic*, 61 Fed., 109, 112, 113; *Butler* v. *Boston, &c., S. S. Co.*, 130 U. S., 527; the *Warkworth*, 9 P. D., 20; *do.*, 145; the *Spirit of the Ocean*, 34 *Law Journal*, Admiralty, 74; the *Great Western*, 118 U. S., 520, 525; *Massey* v. *Morris* (1894), 2 Q. B., 412).

When Congress made the exercise of due diligence by the *owner* to make the ship seaworthy the condition of the ship's exemption from certain causes of damage stated in the third section of the Act of 1893, the presumption is that it intended the exemptions to apply whenever he had been *personally diligent* in the degree required, and that the defaults of the servants whom he employed to manage the vessels appliances should not be imputed to him so as to deprive him of the benefits of the section. The sense of the section is the same as though it provided like the former statutes, that the ship and owner shall be exempted in the cases stated if the losses occur without the design, neglect, privity or knowledge of the owner. If under the earlier acts the neglect or default of servants is not to be imputed to the owner so as to make their design, neglect, knowledge or privity his, no reason is perceived why the failure of competent servants of the shipowner to exercise due diligence to make the ship seaworthy, when beyond his immediate supervision and in their exclusive control, should be imputed to the "owner" under this statute. Such a construction, in effect, makes the statute read, "if due diligence *has been exercised* to make the ship seaworthy," when, in fact, it reads, "if the *owner* shall have exercised due diligence."

(**3**.) The act operates in effect as an exemption from latent defects, by substituting as the measure of the shipowner's duty, with regard to seaworthiness, a warranty of diligence to make the ship seaworthy, instead of an insurance to that effect.

(**a**,) The third section of the statute providing that if the owner of the vessel *has exercised due diligence to make her seaworthy*, he shall not be liable for faults or errors in navigation, &c., construed in connection with the second section, which prohibits the introduction of clauses modifying the obligation of the owner *to use due diligence to make the vessel seaworthy*, indicates that Congress intended, by this statute to abrogate entirely, the former absolute warranty of seaworthiness, and to substitute, in its place, the warranty of due diligence by the owner. This has already been held in a number of cases, where the loss

fell specifically and clearly within the causes of damage expressly excepted in the third section of the statute (The *Silvia*, 64 Fed , 607, 608; 35 U. S. App., 395; The *Sandfield*, 74 Fed., 371; The *Mexican Prince*, 82 Fed., 484, 488, 489; The *Colima*, 82 Fed., 665, 678). In the last case Brown, *J.*, said:

"The context and the pre existing law indicate that the intent of the act is to relieve the shipowner from his previous warranty of absolute seaworthiness in fact, and to substitute for that warranty a warranty only of [due] diligence to make the ship seaworthy."

And in one of his earlier decisions under the statute, (The *Millie R. Bohannan*, 64 Fed., 883), Judge Brown, dealing with the scope and evident purpose of the statute, said:

"*The design of the Harter Act was, I have no doubt, to relieve the carrying vessel from her previous responsibility, as insurer against latent defects*, and to limit her liability as respects seaworthiness, to the obligations of due diligence to make the ship seaworthy."

It was evidently the purpose of the statute to do away with the absolute warranty in all cases.

This conclusion flows from the very language of the act. In the second section, "*the obligations of the owner or owners of said vessel to exercise due diligence*, (to) properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage," are those which he is prohibited from lessening by contract. The statutory statement of the nature of those obligations amounts, practically, to a definition of them, and implies that from the date of the passage of the statute such definition shall be taken as the measure of those obligations. This implication is re enforced by the language of the third section, which provides a statutory exemption in a large number of cases, provided the owner shall have exercised due diligence to make the ship seaworthy, &c., which is stated to be the measure of his obligation in the prior section.

The embodiment in the statute of certain express exemptions from liability does not impliedly exclude other

exemptions by contract. Certain classes of exemptions, not included in the third section, are expressly excluded by the first section. This, of itself, shows that no others are intended to be excluded. The whole field of exemptions, between those excluded in the first section and those expressly provided in the third section, are left to be dealt with by contract

(**b.**) The operation of contract exemptions and of the statutory exemptions, should not depend upon different conditions. It would be quite anomalous to hold that the contract exceptions could only operate where the ship was absolutely seaworthy on sailing, but that the statutory exemptions might apply though the ship was not seaworthy in fact, provided the owner had used due diligence to make her seaworthy. The conditions on which the right to exemption depends, should be alike in all cases. It was apparently the design of the second section of the statute to accomplish this, by defining the shipowners' general obligation as to seaworthiness to be the same as that which the third section requires them to fulfill as a condition of enjoying the exemptions from liability therein provided.

(**c.**) The Court is not bound to construe this statute grudgingly and strictly, as in derogation of the common law. On the contrary, as a part of the law limiting the liability of shipowners, it should, like other similar acts, receive a liberal construction.

Section 4282 of the Revised Statutes, providing an exemption from liability for fire damage occurring without the shipowner's design or neglect, was in derogation of the common law. Prior to that statute carriers were insurers against fire, yet this Court very early adopted the liberal construction that the words "design or neglect" contained in the statute, meant the owner's personal design or neglect, and that he was not deprived of its benefits by the design or neglect of his servants (*Walker* v. *Transportation Co.*, 3 Wall., 150; *Moore* v. *Transportation Co.*, 24 How., 1).

Since those decisions it has been repeatedly announced in this Court that all of the sections relating to limitation of liability (4282–4285, R. S.), including the fire section, should be construed liberally and ungrudgingly.

(**a.**) The construction proposed would not be opposed to the public interest. The question of insurance is really not a practical one (The *Main*, 152 U. S., 122, 123). Competition exists in the business of insurance, as in all other branches of trade. The courts repeatedly have before them causes prosecuted in the name or in the interest of the insurers on cargo, who have paid losses in very plain cases of unseaworthiness, where they were under no legal liability (*e. g.*, the *Centennial*, 7 Fed., 601). The custom to insure is almost universal, and the business of insurance readily adjusts itself to the requirements of commerce. A great majority of the admiralty causes, if not in form, at least in substance and effect, are merely controversies between the different classes of underwriters. The public has no particular interest in having the losses fixed upon ship underwriters rather than on the insurers of cargo.

VII.

The decree of the Court of Appeals should be affirmed, with costs.

New York, March 4, 1898.

Convers & Kirlin,
Proctors for Claimant-Appellee.

J. Parker Kirlin,
Advocate.

APPENDIX.

HARTER ACT.

(NOTE.—Italics indicate parts changed by amendments in the passage of the bill.)

H. R. 9176.

A BILL relating to contracts of common carriers and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted, etc., That it shall not be lawful for *any common carrier* or the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care in transport, or proper delivery of any and all lawful merchandise or property committed to its or their charge, *nor shall it be lawful to limit its or their liability to less than a full indemnity to the legal claimant for any loss or damage therefrom, and* any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to* properly equip, man, provision, and outfit said vessel, and make said vessel seaworthy and capable of performing her intended voyage, or *any covenant or agreement* whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and

[PUBLIC—No. 57.]

AN ACT relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That it shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

SEC. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel *to exercise due diligence* [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly

properly deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if any vessel transporting merchandise or property *between* ports in the United States of America *and foreign ports* shall, *on starting on her voyage, be* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent *or master* shall become or be held responsible for damage or loss resulting from *error of judgment* in navigation or in the management of said vessel, *if navigated with ordinary skill and care, from the time of her leaving her usual place of loading on her intended voyage until her arrival at the usual place of discharge at her port of delivery*, nor shall the owner or owners, *the vessel*, or master be held liable for losses arising from dangers of the sea, acts of God, or public enemies, *or in saving life, and it may be stipulated in bills of lading and shipping receipts that the vessel may render services to property in distress afloat and tow same to the nearest and most convenient port of safety without incurring penalties from deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, agent, manager, or other authorized person to issue to shippers of any lawful merchandise a bill of lading or shipping document stating the marks, packages, or quantity and apparent condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and the voyage, or ports at which such vessel is intended to touch, and such document shall be evidence of the responsibility of the vessel for the merchandise therein described.*

SEC. 5. *That it shall be the duty of the collector of the port in which the vessel is lying to refuse clearance to a vessel from said port if he is informed and is satisfied that the owner, master, agent, commercial carrier, or*

deliver same, shall in any wise be lessened, weakened or avoided.

SEC. 3. That if *the owner* of any vessel transporting merchandise or property *to or from any port* in the United States of America shall *exercise due diligence to make the said vessel* in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, *or charterers* shall become or be held responsible for damage or loss resulting from *faults or errors* in navigation or in the management of said vessel nor shall the *vessel*, her owner or owners, charterers, *agent*, or master be held liable for losses arising from dangers of the sea *or other navigable waters*, acts of God, or public enemies, *or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.*

SEC. 4. *That it shall be the duty of the owner or owners, masters or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described.*

SEC. 5. *That for a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be*

other person representing such vessel, has issued bills of lading for merchandise or property containing clauses that are declared not lawful by section 1 or section 2 of this act, or if he is informed and is satisfied that the owner, agent, master, or other person representing such vessel, will not issue bills of lading, as required by section 4 of this act, for merchandise or property delivered to and received by the vessel for transportation; and the said collector shall withhold clearance papers to said vessel until bills of lading or shipping documents are issued to conform to the said first, second, and fourth sections of this act, or if documents have been previously issued, until they are modified to conform to the requirements of said sections.

liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States.

SEC. 6. That this act shall not be held to modify or repeal Sections 4281, 4282, and 4283 of the Revised Statutes of the United States.

SEC. 6. That this act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, *or any other statute defining the liability of vessels, their owners, or representatives.*

SEC. 7. That this act shall take effect from and after the 1st day of *September, 1892.*

SEC. 7. *Sections one and four of this act shall not apply to the transportation of live animals.*

SEC. 8. That this act shall take effect from and after the first day of *July*, eighteen hundred and *ninety-three.*

(Passed the House, amended to read as above, December 16, 1892. 24 Cong. Rec., pp. 147–149, 169.)

Passed the Senate as amended February, 1893, 24 Cong. Rec., 1275. Senate amendments concurred in February 8th, 1893. 24 Cong. Rec., 1342.

Approved, February 13, 1893.

[2 Supp. R. S., p. 81.]